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Case and Comment

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. . .

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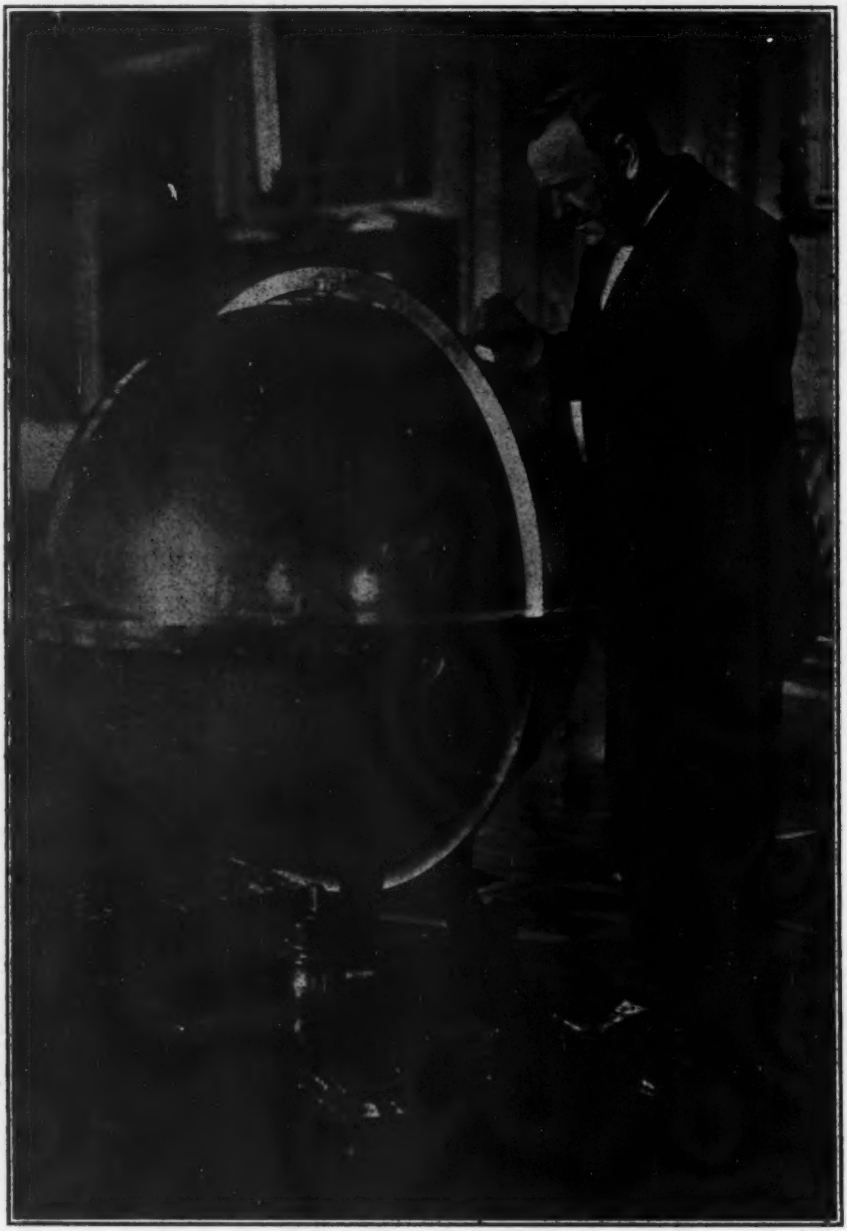
"The hopes of humanity are hanging breathless on its fate." The waters at times seem troubled, but our course is plain. An enlightened public opinion is our pilot and our grand Constitution is our chart and compass. I trust that the fine conception of the great poet may be realized:

"Thou, too, sail on, O ship of state!
Sail on, O Union strong and great!
Humanity with all its fears,
With all the hopes of future years,
Is hanging breathless on thy fate!

"We know what master laid thy keel;
What workman wrought thy ribs of steel!
Who made each mast, and sail, and rope,
What anvils rang, what hammers beat,
In what a forge and what a heat
Were shaped the anchors of thy hope!"

—From Speech of Hon. Burton E. Sweet in House of Representatives.



SECRETARY OF THE NAVY—HON. JOSEPHUS DANIELS.
A man of legal training who directs the movements of our fleets.

Case and Comment

VOL. 24 SEPTEMBER 1917 No 4.

Personal Equation in Judicial Procedure

BY HON. LEWIS M HOSEA

Of the Cincinnati Bar

Former Judge of the Ohio Superior Court

THAT all human systems, though founded in reason and based on experience, depend at last for their real efficiency upon the human element concerned in their administration, will be conceded. That judicial thought is properly conservative is also obvious enough. As eloquently expressed by a younger friend of mine in a recent address:

> The present is the child of the past. To-day is born of yesterday, molded in its likeness, nurtured in its precepts, reared in its traditions, enjoying by inheritance the fruits of its righteous labors, or suffering by the immutable laws of God the penalties of its misdeeds. As the seed of yesterday was sown, so is the harvest of to-day. The succeeding generation inherits, perforce, the joys, the sorrows, and the burdens of life as handed down by the fathers; and with them in turn rests a mighty responsibility to posterity. And so it is that a true vision of to-day cannot be had save in relation to that past.

The concrete beginnings of a systemized judiciary are as old as the tribal relation. Men quarreled about rights and wrongs as soon as they began to live together as a community, and the chief of the tribe, or the "elders," judged between claimants. Indeed, at the earliest beginnings of recorded history, we find in Egypt a judicial system including a reviewing power and remarkably developed ideas of administrative justice. Judicial officers in their epitaphs rest their claim to immortality upon having judged impartially, never oppressing the weak and humble, and their merciful regard for the fatherless and the widow. In the Code of Hammurabi, of Babylon, were embodied many of the essential principles of modern justice which were transmitted to European peoples through the conquests of Alexander and the Romans. These form the primal basis of the Roman civil law, and also of the common law of our English ancestors, derived through the early tribes of Northern Europe.

Even old Homer (600 B. C.) gives us a suggestive picture of the modern system of court trials, in the Odyssey:

> What time the judge forsakes the noisy bar
> To take repast, and stills the wordy war.

Indeed, I might take a text for all I would say from that strikingly high ideal of the judicial office found in the Sanskrit drama of the "Clay Cart," dating about 200 B. C.,—the earliest known example of dramatic writing. I quote from the translation by Sir Monier Williams, where the judge soliloquizes:

> How difficult our task! to search the heart,
> To sift false charges and elicit truth!
> A judge must be well read in books of law,

Well skilled in tracking crime, able to speak
With eloquence, not easily made angry,
Holding the scales impartially between
Friends, kindred, and opponents; a protector
Of weak and feeble men, a punisher
Of knaves; not covetous; having a heart
Intent on truth and justice; not pronouncing
Judgment in any case until the facts
Are duly weighed, then shielding the condemned
From the King's wrath; and loving clemency.

Here is a standard worthy to rank with the highest modern ideals. Why is it that we find to-day conditions tending to undermine the public respect for courts and that innate love of justice which we as Americans inherit from our Anglo-Saxon ancestry? Why is it that public dissatisfaction with judicial procedure is so pronounced that our law associations are everywhere striving to find adequate remedies?

Many years ago, with the general purpose of simplifying the intricacies of the common-law practice, state codes of procedure were adopted embodying the benevolent principles of equity and emphasizing the ultimate aim of securing the blessings of a high quality of justice to the people. Most of these codes begin with the declaration that their provisions and all proceedings are to be "construed liberally" in order to "promote their object and assist the parties in obtaining justice;" yet they seem to have proved traps for the unwary, for to-day it is authoritatively stated that the majority of decisions rest upon technical points of practice not involving the merits.

The cause of the difficulty lies elsewhere; and primarily, as I conceive, with the people themselves. Courts and systems are what the people make them to be; and all our institutions depend at last on the ability and character of those whom we select to administer their functions. Even a poor system well administered, with an intelligent and broad view of the good to be accomplished, is better than a good system unintelligently and poorly administered.

Until the latter part of the last century we were still in the pioneer stage, where absolute freedom of individual initiative was freely fostered as the mainspring of our progress.

Old standards and ideals were still influential, and the inherent Anglo-Saxon reverence for courts and the administration of justice was still cherished. But we have forged ahead into an era in which the immense progress of mankind in discovering and utilizing the forces of nature, and in extending the scope and power of commercialism by systematic efficiency in business methods, has centered attention and ambition upon wealth and the power it gives, and bred an indifference to the ideals of citizenship that has been fruitful of evil to the bar and the bench.

In the business world the trained expert has come into his own, and is no longer the butt of self-assertive ignorance. Even in municipal government people are awaking to the fact that its problems are complicated and require the aid of trained experts. No intelligent layman at this day will deny that the due administration of justice would be far better subserved if every judge possessed a trained and clear vision as to essentials, viewed things in proper perspective, and was gifted with a business man's inherent sense of order and the value of time. If we are to answer frankly the question why such a condition is the exception and not the rule, we must answer that it is because, in the last analysis, we have been careless and indifferent to the obligations of our citizenship, and elevated partisanship above common sense and common duty in the selection of judges and legislators.

The sort of government contemplated by our fathers is a representative system based on manhood suffrage and involving checks and balances tending to preserve individual liberty intact. Life was a comparatively simple matter in those days, and our forebears were idealistic. They were building for a posterity supposed to be created equal, and were, perhaps, not acquainted with the law since discovered by David Harum, that there is a great deal of human nature in people,—"more in some than in others." But they had read history, nevertheless, and knew that all primitive tribes and peoples regarded their wisest and most experienced men with reverence, as best fitted to decide for all in difficult situa-

tions. Naturally our fathers supposed that civilized men would be at least as wise as the old tribesmen, and that the free citizens of a representative Republic would select the wisest, best fitted, and most experienced to make the laws and to administer justice. Washington, in appointing the first justices of the Supreme Court, was prayerfully and painstakingly concerned to select not only the ablest lawyers, but those everywhere known to be so, in order that the court should at once take a high place in the respect and esteem of the people; for he repeatedly characterized the judiciary as the "chiefest pillar of good government."

But our forefathers overestimated the wisdom of their successors.

Perhaps it is unreasonable to expect ideal conditions in a body politic so largely recruited from widely diverse foreign elements and in a system where the vote of the most ignorant and unprincipled loafer counts for just as much as that of the President of the United States,—and there are "quite a few" more loafers than ex-Presidents.

But is it too much to expect, in an elective system, that the judicial office can be entirely severed from politics? We know perfectly well that—

> . . . Whatever day
> Makes man a slave, takes half his worth away.

Our representative democracy has, in its larger aspects, been measurably successful because our national life has, in the main, tended to breed honest and capable men; and there is still left some of the old leaven of that deep-seated respect for law and the administration of justice which is our Anglo-Saxon heritage.

The remedy of referendum and recall to undo the acts of legislators and judges is illogical in assuming that the voter, confessedly unable to select proper representatives, will possess the higher wisdom necessary to undo their official acts. Not only is it illogical, but it tends to sap the foundation of our institutions and substitute the evils of an irresponsible democracy.

Present conditions are illogical and unfortunate and are, after all, but partial causes of the net result. The selection of public servants for specific administrative duties stands upon no other basis than the fitness and efficiency required in private business. But in reality, the selection of judges is more difficult and delicate than that of any other class of public servants under a political system. The administration of justice enters so intimately into all the relations of human life and conduct that no man should be intrusted with judicial power who is not qualified by temperament, education, character, and the maturity of experience that age alone can give. The judiciary is, in fact, and not merely in sentiment, the "firmest pillar of good government."

The best and indeed the only rational remedy is first to educate the voter to realize the necessity of taking the judiciary out of politics, and to establish by law a high and specific standard of education, character, and experience for candidature of judges.

Of all public offices the judicial is most difficult to fill properly, because it requires, for really efficient service, the rarest combination of qualities to be found in a human creature,—the judicial temperament idealized in the Sanskrit drama quoted above. The judge should possess by nature that high quality of mind that regards justice as a sacred thing, and his office as a sacred trust, involving the performance of a service too exalted and too absorbing to admit of any petty or personal consideration. He should dignify the office by a high courage and courtesy both of speech and bearing; and in every act and word avoid the appearance of evil. He should of all things avoid that unworthy pride of position in which—

> To-day with power elate in strength he blooms—
> The haughty creature in that power presumes.

All this may—and to some extent must—isolate him; but it is the price of that higher esteem and reverence which the public will always feel toward the ideal judge who really *fills* the judicial position.

Lewis M. Hosea

Joseph H. Choate and Right Training for the Bar

The Present-day Need of Legal Clinics and the Restoration of Common-law Training for Students Illustrated by Certain Aspects of Mr. Choate's Career

Modern Vocational Training Applied to the Law, True "Preparedness" and Governmental Efficiency the Goal

BY WILLIAM V. ROWE

of the New York Bar

NE of earth's rare and precious personalities, always absolutely honest with himself and with the world, an aristocrat by nature and culture, with a beauty of soul set off by the beauty of the body in which it found itself, Mr. Choate was, by practice and sympathy, and under all circumstances, an American gentleman, sharing joyfully in the common life of the day, and, to the last, a patriot and constant self-sacrificing servant of the public welfare. The superior, inborn qualities and the New England conscience were at all times in command. While he loved the people and the people loved him, exhibiting for him a lasting affection and esteem, he was always a fearless leader and master of men in general, as well as of courts and juries, and never a follower of their whim or caprice.

Mr. Choate's pre-eminence, chiefly attributable to force and beauty of character and to a great spiritual personality and the indefinable qualities which enter into their development, was, nevertheless, in large measure, due to right training in his profession. This practical point of view interests us at the moment, because it bears directly on the subject in hand, a subject which lays its whole stress on *training*. Our meaning (covering also the cultivation of the broader ethics, of social and political duty, patriotism, and the professional spirit) cannot be better illustrated than by reference at the very outset to one of his most marked characteristics, his abhorrence of all shams and technicalities. With this, the New England conscience and inherited traits are in part to be credited, but it owed its principal impulse and development to his training and association with Rufus Choate, Leverett Saltonstall, and Mr. Evarts in the liberal and general practice of former days. Always going through the form to the substance of things and seeking to work out justice, he could never be persuaded to consider seriously a mere technicality or a point in the law of practice and procedure, where justice was likely to suffer. That price—the sacrifice of justice, the full opportunity for a day in court and a fair trial on the merits—he would never pay for success for any client.

With Mr. Choate's passing, the light of the bar "is as if gone out," but its reflection or afterglow upon the events of this truly great life holds before our vision many important lessons for the present hour and the present purpose. Passing from us in full action, he was the last survivor of that race of legal giants produced, nursed, and developed under our old-fashioned general practice and office system, preceded by the indifferent and apologetic law-school instruction which prevailed, to a great extent, even down to the late 70's and early 80's. He also lived, and this is one of the significant features of his remarkable career, to play a leading and successful part in the highly specialized corporation and business practice of the attenuated and intellectually weakened life of the bar during the last twenty-five years, and, with his singular adaptability and his broad sympathies, was as easily first in this new practice and the life of this

Photo by Press Illustrating Service, Inc., N. Y.

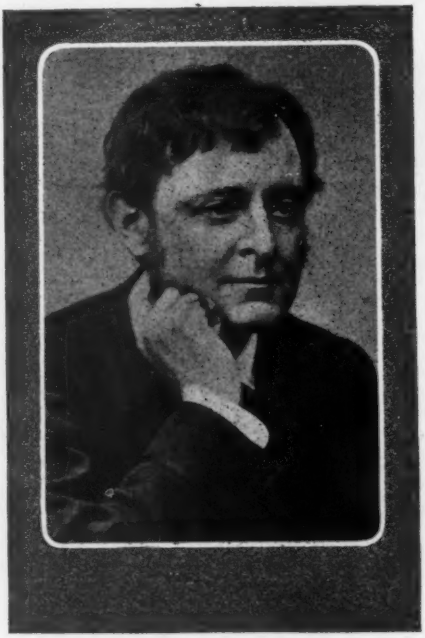
JOSEPH H. CHOATE AT HIS DESK ON HIS EIGHTY-FIFTH BIRTHDAY

new business world as he was always first in the old. The experiences of his student days and his professional life, therefore, furnish a strikingly useful guide at this moment.

Fortunate in his principal associates, he found in them similarly well-trained men of equally noble purposes and ideals. Mr. Evarts, his leader, a great American and international lawyer and statesman and for many years the leader and the most brilliant mind and wit at the American bar, was strongly supported by Charles F. Southmayd, America's greatest man of law and master of jurisprudence, and by Charles E. Butler, one of the ablest solicitors and draftsmen of the latter half of the last century.

To be sure, Mr. Choate's was an exceptional career, but in its legal aspects it could readily be matched in kind, although not in degree, by the experiences of all the prominent American law offices of his early and middle life. Besides the chief New York city firms of Butler, Evarts, & Southmayd (later Evarts, Southmayd, & Choate—his own firm); Scudder & Carter; Alexander & Green; Butler, Stillman, & Hubbard; Strong & Cadwalader; Blatchford, Seward, Griswold, & Da Costa; Shipman, Barlow, Larocque, & Choate (the firm of Mr. Choate's brother, Ex-Judge William G. Choate, a very great lawyer); Dillon & Swayne; Bangs & Stetson; Brown, Hall, & Vanderpoel; Anderson & Howland; Man & Parsons; the different firms of Elihu Root, of Everett P. Wheeler, of Walter S. Carter, of William B. Hornblower, and of Benjamin F. Tracy;

Nash & Kingsford; Coudert Brothers; Foster & Thomson; Emmet & Robinson; Turner, Lee, & McClure; Davies, Work, McNamee, & Hilton; Stickney & Shepard; Burrill, Zabriskie, & Burrill; Hill, Wing, & Shoudy; Wetmore & Jenner; Jay & Candler; Beebe, Wilcox, & Hobbs; Brownell & Lathrop; De Witt, Lockman, & DeWitt; and Hand & Bonney; there were countless others of similar character in New York and in all the older centers throughout the country. The practice of such offices offered the same variety of experience as that presented by Mr. Choate's busy life. Him we find constantly employed, and covering the whole gamut of common law, equity, and admiralty practice, with frequent important excursions into the domains of constitutional, international, military, criminal, and even patent law. Then, too, the widely diversified charity and legal aid work of men and offices of that type was endless. Until what we may term the modern commercial and specialized period of the last twenty-five years, with its increased and unassimilated immigration from Central and Southern Europe, there was no need, no demand, for legal aid society work as it is now known, and no reason for encouraging or promoting the participation by students in that work—now suggested—for the sake of the clinical experience, now so constantly required, to enable them to recover their long-lost ground in necessary training.



From Photo by Sarony in 1886

JOSEPH H. CHOATE

As he appeared in the early years.

Picture the infinite variety in Mr. Choate's work as an illustration of the old methods and the old general practice, under which students unconsciously grew into well-equipped lawyers and the people's law underwent normal development, by reason of the generality of the people's activities daily brought before the bar and the courts; and then measure, by comparison with the methods and conditions of to-day, the incalculable benefit to the law itself and to the students and junior clerks who labored with him in his office and court work. He ranged from the military case of General Fitz John Porter at West Point which re-established General Porter's status, or the naval case of Captain McCalla at the Brooklyn Navy Yard, in the morning, to charitable advice to a widow as to her husband's estate, or the conduct of a charitable case of partnership accounting for an impecunious client, in the evening, with incidental preparation, in later years, for the Second Hague Conference, or the argument of the great constitutional questions in the Income Tax Cases before the Supreme Court of the United States. In this way, for forty years and more, his days and nights were filled, for the nine months of the year during which he never spared himself. The other three months were given almost wholly to his family, his friends, and his summer holiday. The gospel of hard work —of full preparation and "preparedness" —ruled his life, and was the key to his success. A legal genius unwilling to work hard is bound to be a failure.

Happy in the ever-changing aspects of his work, Mr. Choate's life was really a glorification of labor. In great measure, that must be true of all real lawyers,—they "work hard, live well, and die poor." Mr. Choate met fate and defeated her,—he did not "die poor." One week, for example, would be devoted by him to a case in the law of sales involving an alleged breach of warranty in a sale of East Indian coffee; the next to a building-contract case between the late Richard M. Hunt, the famous architect, and Mrs. Paran Stevens, the wife of an equally famous hotel proprietor, in which case "the house that Jack built" and "the maiden all forlorn" played a prominent part before the jury. A notorious divorce case, involving the whole law of common-law marriage, in which he made a beautiful child his "exhibit A," would be succeeded by an ordinary commercial case of conditional sale, or involving a promise for the benefit of a third party, or a case covering the most difficult points in the law of bills and notes, and in that of general assignments and bankruptcy, or by a stockholders' suit to test the validity of the lease of the Air Line Railroad by the New Haven,—the first step in New Haven's expansion. The last phases of the Credit Mobilier litigation, involving in a stockholder's accounting suit in the Federal court the contract for the construction of the Union Pacific Railroad, would be followed by the important series of cases of stock-sale contracts against Collis P. Huntington, covering the whole history of the construction of the Central Pacific and the relations of the "Big Four," Collis P. Huntington, Mark Hopkins, Leland Stanford, and Charles Crocker. As Mr. Choate described their relations, "If Huntington took snuff in New York, Hopkins sneezed in San Francisco."

JOSEPH H. CHOATE
From a recent photograph.

Roscoe Conkling, who was the chief opposing counsel in these so-called "Huntington Cases," never ceased to express his appreciation and gratitude for the tribute and compliment which Mr. Choate paid him on one of the trials. It was Senator Conkling's first appearance at the bar, following his retirement from his somewhat tempestuous career in politics and in the United States Senate. Mr. Choate, with that inimitable grace and courtesy of which he was at all times in command, welcomed his eminent friend back to the bar,—"a man who has come through the fire and smoke of the greatest political battles of our time with absolutely no taint upon his garments." It was in his summing up in the first trial of those cases that Mr. Choate made his startling application to Senator Conkling of the familiar quotation from "Hamlet," beginning—

> See, what a grace was seated on this brow:
> Hyperion's curls; the front of Jove himself;

and ending—

> A combination and a form indeed,
> Where every god did seem to set his seal,
> To give the world assurance of a man.

The aptness of the quotation and the full force of the compliment can be un-

derstood only by those who remember the great impressiveness of the Conkling "front" and the "curls" gracefully falling on the "brow," a manly "combination," in perfect "form!"

As soon as Mr. Choate had finished a several months' trial of an action for libel, involving and vindicating the integrity and value of the Cesnola collection of Cypriote antiquities in the Metropolitan Museum of Art,—a trial in which he was opposed by Francis N. Bangs, one of America's strong and very eminent lawyers, and in which, in an amusing application of "A Midsummer Night's Dream," he told the jury that they must not be alarmed by the roaring noise they had heard; for, after all, it was "not a real lion, but only Bangs, the lawyer,"—he was at once called into legislative hearings on bills for the benefit of the Museum of Natural History, and was obliged to represent the interests of the West Shore, the North River Construction Company, and the New York Central Railroad, in suits to foreclose the mortgage of the West Shore Railway and to restrain, on complaint of a stockholder, the lease of the West Shore by the Central. In the Cesnola Case he had really developed the whole scene with Bottom from "A Midsummer Night's Dream," for the benefit of the jury, and that calls to mind an anecdote which is not altogether out of place, for it illustrates the charming and sunshiny geniality of his personal atmosphere, and his approachable and inviting manner, dignified but warm, as well as his constant display of striking versatility and all-round qualities when in action. At a certain well-known Swiss hotel, during one of his summer holidays in Switzerland, he had just finished that distressing and gastronomically-disappointing task, a *table d' hôte* dinner on the Swiss plan, when he was heartily greeted by an English gentleman who had sat at the opposite end of the table. The Englishman said: "We have been observing you, as an American, with much interest, and I want to ask you a very impertinent question, if I may. What are you by occupation or profession? Won't you be good enough to tell me, because my wife says you are a clergyman, my daughter insists you are an actor, and I say you are a lawyer. We can't all be right." "Yes, you can," instantly retorted Mr. Choate, "I am something of all three,—three in one. I preach a good deal, act a little, and practice more or less law,—which means that I am an American lawyer. Tell your wife and daughter you all guessed right."

The New York Central cases would hardly be closed before Mr. Choate might find it necessary to plunge into the hearings in the long controversy between Lord Dunraven and the New York Yacht Club over the famous international yacht race between "Defender" and "Valkyrie III.," in which the action of the yacht club had been criticized by the English challenger, and these hearings would perhaps be followed by the trial of the extraordinary case of Laidlaw v. Russell Sage, arising out of the dynamiting of Russell Sage and his alleged attempt to use the plaintiff as a shield, and presenting novel questions in the law of assault and trespass. Incidentally, it may be noted that this was the only case in which Mr. Choate was ever known to over cross-examine,—a common professional fault. His indignation had been so excited by the circumstances of the case that his cross-examination actually turned inside out the "vest" and other personal garments of the defendant, the original history and condition of which the cross-examination fully exposed to the public gaze. In the years between 1880 and 1895 he was frequently employed in successful pioneer work in so-called Elevated Railroad Cases, which were actions at law, condemnation proceedings, and suits in equity, brought to recover heavy damages arising out of the construction of the New York system of elevated railroads through and over the public streets, and which involved wholly novel questions in the law of easements relating to the rights of abutting owners to light, air, and access,—cases in which Mr. Evarts and Mr. Choate were at times both engaged, and in which frequently arose the most difficult conceivable questions of title, including the title to old Dutch streets as affected by the civil law. At the same time, he was oc-

cupied for years with the defense of the Standard Oil Companies and the so-called Standard Oil Trust, in the famous "Anti-trust Law" suits, including the cases attacking the Texas and Ohio Anti-trust Laws, and other cases covering the usual difficult, but at that time quite novel, Anti-trust Law questions, and in cases involving the valuation of oil properties, alleged breaches of warranty, building contracts, and many other matters, with constant legislative and congressional investigations. All this work was varied by great will contests, long drawn out, and great will construction suits, in the surrogates' or probate courts and through the medium of equity and partition suits, involving the Cruger, Vanderbilt, A. T. Stewart, Samuel J. Tilden, Hoyt, Drake, Hopkins-Searles, Vassar, Vanderpoel, and almost innumerable other wills which came before him year by year, presenting extremely important and embarrassing questions in the law relating to testamentary instruments and trusts and their construction, and covering all phases of insanity issues and the law of undue influence and testamentary capacity. This class of litigation included jury trials and the most carefully prepared cases on appeal in the higher courts. Landlord and tenant cases, arising, perhaps, in the form of ejectment suits for one of the Astor estates, would be followed by the important case against the Canada Southern Railway, testing before the Supreme Court of the United States the rights of domestic purchasers and holders of foreign railway company bonds, or the Brooklyn Bridge Case, before the same court, involving the right to build and maintain the great and necessary structures connecting New York and Brooklyn, or the Stanford University Case, from California, also before the Supreme Court, in which the United States sought to recover many millions from the Leland Stanford estate, the success of which suit would have deprived the University of a large part of its endowment, and in which case Mr. Choate's successful appeal for the University resembled Webster's appeal for Dartmouth College; and this, in turn, might be succeeded by the Bell Telephone Case, involving the entire Bell telephone patent. His work before the Supreme Court of the United States in all these years was continuous. The Behring Sea Case before that court, in which he appeared for the Canadian government, and which involved the right of the United States to seize and condemn Canadian and other vessels in Behring Sea, was matched in importance by the New York Indians Case, which had to do with the Indians' right to lands on their summary removal to limited reservations in other parts of the country; and these cases would no sooner be finished than he would be called into the case of the Pullman Palace Car Company against the Central Transportation Company, involving a great contract of lease, or the Southern Pacific Land Grant Case, the Chinese Exclusion Cases, the Alcohol-in-the-Arts Case, involving rebates of millions of dollars under the tariff laws, or the Massachusetts Fisheries Case (Manchester v. Massachusetts), relating to the state's right to protect fisheries in arms of the sea within or beyond the 3-mile limit. He would hardly have finished such a long series of cases before the Supreme Court before he would be called into an admiralty collision suit for the White Star Line, developing novel and abstruse problems in hydraulics and suction-action, in the case of overtaking ships of varying tonnage and draught, or suits presenting equally novel and complicated bill of lading problems arising out of the fire on the Inman Line pier and the destruction of the cargo of the steamship Egypt of the old National Line. While these cases were under way, he would, perhaps, be consulting with Mr. Evarts over the trial and argument of cases involving the whole common law of covenants and conditions subsequent as applied to deeds of property abutting on portions of the old Bloomingdale Road, as affected, in turn, by New York's great Riverside Park Improvement, or would be preparing to argue before the Supreme Court of the United States or elsewhere the great constitutional questions in the Income Tax Cases, the Reciprocal and Retaliatory Taxation Cases against insurance companies, the Kansas Prohibition Law Cases, the California

Irrigation Law Cases, and the Neagle Case, this last involving the assault by Judge Terry, of California, on Mr. Justice Field, which raised the whole question of the power of the Supreme Court to protect itself and its officers within the jurisdiction of a state; or, after arguing in Washington the constitutionality of the Federal and state inheritance taxes, we might find him called in to his triumphant and spirited vindication of the rights of the bar, as against aggressions of the bench, in the contempt proceedings instituted by Recorder Smythe of New York, against Mr. Goff (afterwards recorder, and now Mr. Justice Goff, of the New York supreme court), —a peculiarly satisfactory and successful experience for Mr. Choate, in which he made one of his most forceful, eloquent, and convincing appeals to judicial as well as to human nature. While advising with Mr. Evarts as to the replevin action by the Turkish government, for which they were acting, to recover a consignment of rifles, he might find himself in the midst of the preparation for the trial of the greatest action for deceit (in the form of a suit in equity for an accounting) ever brought in New York,— the controversy between the Banque-Franco-Egyptienne, of Paris, and various leading New York bankers over the sale of the old New York, Boston, & Montreal bonds,—or might be considering with his other partner, Mr. Southmayd, the firm's opinion as to a railroad reorganization plan. One week would find him occupied in the New York court of appeals with the so-called Maynard Election Fraud Cases and the cases involving the inheritance taxes under the Vassar will, with other questions affecting Vassar College, and the next week would see him before the Interstate Commerce Commission, representing the Orange County Farmers of New York, in a long and successful controversy with all the railroads centering in New York and Jersey City over the freight rates on New York city's milk supply. The very next week, in turn, he would himself represent the same railroads, or some of them, before that Commission or before a congressional or legislative committee, on a question of rates, of regulation, or of taxation. While he was settling the membership law for clubs and exchanges in what was practically the pioneer American litigation on that subject, in the famous cases of Loubat v. Union Club and Hutchinson v. New York Stock Exchange he was also settling important features of the law of arbitration in a great building contract case. After a prodigious winter's work in will contests, and various important arguments before the court of appeals in New York and the Supreme Court at Washington, he devoted the entire summer and fall of the year 1894 to the work of the New York Constitutional Convention, of which he was President, and whose proposed constitution, due chiefly to his personal advocacy, was fully and triumphantly adopted by the people of the state, and is still in existence and serviceable. From that work his normal activities would drive him, perhaps, into an intricate partnership accounting with the estate of Paran Stevens, over a complicated hotel business, or into a long trial of a jury case, in which he appeared on behalf of the Western Union Telegraph Company and Jay Gould, involving questions of contract and tort in its relations with the old Bankers & Merchants Company and other telegraph companies,—one of the trials in these cases furnishing us with the only instance (due in part to extraordinary heat in the month of June) in which Mr. Choate's voice was ever known to weaken through huskiness. Following these, he was liable at any time to be drawn into the accountings of the executors and trustees under the Astor and various other wills, or to be called upon to advise in relation to the last professional service of Mr. Evarts, rendered to the High Court of Chancery of England in its capacity as guardian of infants. For many years he found himself employed before the court of claims or special commissions, or before the Supreme Court of the United States, in the Berdan Arms Case and other difficult cases, and in the claims arising out of the Alabama Awards, and, later, in the Spanish Treaty Claims, followed by many extraordinary drawback and other revenue cases, some of which went to the Su-

preme Court. And, to cap the climax, he was occasionally, as we have heretofore pointed out, called into great patent cases; for example, that involving the whole Bell telephone patent. As evidence of his complete mastery of the problems of intensively specialized modern business law, reference may be made to his successful handling, following his return from the English ambassadorship, of the various controversies arising out of the receivership and proposed readjustment and reorganization of the affairs of the Third Avenue Railway Company of New York.

The superb quality of his moral and physical courage, built up from his early training and associations, a courage without which no lawyer is fit for his profession—always ignoring mere popular clamor and the passing temper of courts and all the political party-feeling of the moment—he constantly manifested in his service at the bar and in his continuous work for the public welfare: Witness his experiences during the Draft Riots of Civil War days and, later, in promoting the prosecutions of the Tweed Ring; his work in converting the people to a favorable view of the beneficial, but sometimes radical changes introduced by the New York Constitutional Convention of 1894; his independent candidacy for the United States senatorship, against Thomas C. Platt and the Republican party machine; his exposures of Prussian and other hypocrisies at the second Hague Conference of 1907; his patriotic war speeches and devoted war services, literally unto death, during the last two years of his life; his championship of the rights of the bar in this very Goff Case, already called to mind; his defense of the national courts and the national power, in defiance of alleged state rights, in the Neagle Case, to which we have just referred—a case undertaken at the earnest request of his old friend, Mr. Justice Field, of the Supreme Court; his appearances in criminal cases (sometimes a distasteful task, but always for the service of the ends of justice), in defense for example, of indicted "Tobacco Trust" magnates and Tammany politicians, and in the election fraud cases against Judge Maynard; his repeated appearance for the unpopular so-called "Standard Oil Trust" and "Tobacco Trust;" his constant protection of the law itself, the rights of the bar and the proper dignity of the judicial office—for which, naturally, he never could exhibit or feel anything but the highest veneration and respect—against the assaults and encroachments of untrained savage natures or small minds in high judicial place; and, finally, in that behalf, who can ever forget—certainly no one within the sound of his voice—such episodes as that in which, with stern face and a characteristic mesmerizing flash of the eye, he appeared to rebuke a well-known judge, who persisted in refusing to hold a case and in taking Mr. Choate's default (which was promptly opened in due course, without terms), when he was actually engaged in a pending trial in another court—"Your Honor insists that you have called this case and set it for trial, to proceed notwithstanding my engagement. Very well, you may have the physical power, but you have neither the legal nor the moral right to do that" (in his relations with that particular judge there was some estrangement for several years, and the judge eventually apologized); or that other instance, in which he was forced to correct the weak, ill-mannered, prejudicial habit of a strong natured presiding judge, who, ignoring the presence and argument of counsel, frequently turned his back and carried on an animated discussion with his associates on the bench—a proceeding which so annoyed Mr. Choate during the argument of the Tilden Will Case that he stopped short, and, not hearing any noise, the learned judge looked around, whereupon Mr. Choate said with tremendous emphasis—"Now, if Your Honor please, under your time allowance, I have just forty minutes in which to close the argument of this very difficult and vitally important case, and I must insist upon having your Honor's undivided attention during every moment of that time." His keen sense of justice and fairness touched to the quick, the judge responded immediately—"You have it, sir"—and then sat bolt upright, with fixed attention, during the entire argument. And Mr. Choate won his case.

This bare enumeration of extraordinary and remarkably suggestive activities might be paralleled by a detailed description of his employment, or that of any other student similarly placed, during his student and junior clerkship days with Scudder & Carter and Butler, Evarts, & Southmayd. Beginning in 1854–5, with him, these experiences of students in general practice, suggested by such a list of activities, continued down to the early 90's. During his own student and clerkship days, Mr. Choate was thrown in constant personal contact with all of the partners of the firm, and, after the manner of those days, copied in a fair hand (a beautiful specimen of handwriting, even down to the day of his death) all their important drafts of opinions, wills, deeds, contracts, pleadings, and other papers; carried messages for them to other members of the bar, with whom he thus became acquainted; met and consulted with clients; answered the calls of calendars and dockets in the various courts, in this way becoming known to and familiar with the personalities of the different judges; assisted in the preparation and in the actual trial and argument of cases; and participated in all ways in the absolutely general and unlimited work of a busy law office of those days engaged in a general and miscellaneous practice.

In a less degree, possibly, as we have said, but not differing in any other respect, that was the experience and routine of all students and law offices in those times, and the variety and extent of Mr. Choate's practice, as illustrated by this recital of cases and controversies, were, as we have suggested, merely typical of the work in all the older offices, with variations simply in the amount of practice and the importance of the cases.

Then, in the late 70's and early 80's, came stenographers, typewriters, and the telephone, and, with the railroad, general corporation, and banking exploitations, came also the beginnings of the modern business practice with its limited court work and its intensive specialization. The changes thus produced gradually interrupted this older office routine of the student, and threw him back upon the *law schools,* which, thereupon, increased their activities and numbers, but *did not change the curriculum or method of instruction to meet the new conditions.* There was no time any longer in the law office for charity and legal aid work, and the legal aid societies and the contingent fee business were, in due course, developed to fill—but quite inadequately—that particular gap. Nearly all the former opportunities of the student for general practical experience and the acquiring of general acquaintance at the bar and with courts and judges were destroyed. The average student and junior clerk became less and less well equipped, and more and more of a nuisance, due to incompetency and lack of trained capacities.

This condition has continued for nearly twenty-five years. The law schools have done nothing to supply the need created by this loss of practical, or clinical, experience, beyond offering useless professorial practice courses, with occasional "moot courts," which are ridiculous and equally useless.

Then, too, we must bear in mind that the increased specializing and the growing solicitor's business and best work of the modern law office has narrowed the whole development of the law. What Rufus Choate has called "that boundless jurisprudence, the common law, which the successive generations of the state have silently built up," is distinctly the people's law, growing with the unlimited, national, individual and community life of the people of our Anglo-Saxon democracies. It does not grow through friction in the law office, or even in the courts over the limited and narrow specialized controversies originating in the highly specialized practice of the new day,—a practice which springs only from the modern banking and the all-absorbing corporation life of Wall street and similar business centers. On the contrary, flowing from the life of the whole people, it can find its natural and normal development only through the large and small miscellaneous controversies of all classes of the citizens, high and low, of the country at large, as they were formerly presented in and out of court, through the medium of the old-fashioned law practice. In other words, this old general practice, with its charity or legal aid

work, cared for in the law office itself, promoted at every point the natural growth of the broad unrestricted law of the people. The stoppage of the charity and legal aid work, and of the former generous amount of court work, and the limitation of practice to office work and the modern special lines of banking and corporation practice, removed the people as a whole from touch with their own legal system, subordinated their rights, led to overlegislation and patchwork statutes, and stopped the healthy growth of our American common law.

Our system, under our written Constitutions, is intensely legalistic, and our citizens must constantly appeal to the law and lawyers for the ascertainment and vindication of their rights. In these later years, while the legal aid societies have attempted, as far as practicable, to supply the service formerly gratuitously furnished by the lawyers themselves, the people, as a whole, cannot afford, and can find no opportunity, to appeal to the law for justice; and the result has been, during these last twenty-five years, in increasing degree, the constant crushing of the liberty and rights of the mass of the people beneath the weight of our system. There has been discontent, naturally, because, lawyers being essential, the people have not been able to secure, through lawyers, this contact with their own legal system. It is clear that the old normal and necessary development of the law, through the healthy, general participation of the people in the process, can be restored only by restoring the people's opportunity for intimate contact with the law through legal aid work. That work, the burden of which was formerly borne efficiently enough by the old lawyers of another day, is now to be deemed a very substantial *part of our legal system*. In other words, legal aid work ought not to be a charity or social-service enterprise. It is, under our form of government, *a proper public or state function*, and must be a free public service open to all citizens who cannot afford to employ a lawyer and pay court fees. The people must, in this respect, come to their own. The Public Defender movement, to supply legal aid to criminal defendants too poor to pay counsel, is really and properly a part of the work of the legal aid societies, and should be so treated, and be promptly taken over by a state legal aid bureau in the judiciary department of each state. It will at once be seen that this process will quickly restore a broad, general, unlimited practice, covering all branches of the law and every conceivable question; and that students will, in such work, find a renewal of their former life and satisfied aspirations, after nearly a generation of complete loss of such opportunities for general experience, which the students, for instance, of Mr. Choate's day found always at hand.

To accomplish this restoration of the common-law development, and broaden once more the training of our students, we need merely to provide properly for and develop legal aid work, and to *compel* the association of the law schools systematically, and as part of the curriculum, with all legal aid agencies, public or private. In other words, we must establish legal clinics,—legal hospitals and dispensaries, where students participate in clinics. This means the "case system" in action, the substitution of live cases and live issues for the dead cases of the "case books." It is, in short, simply the practical work now firmly established as the chief part of the course in all modern vocational, technical, and professional schools, from agriculture and "business," through engineering, to medicine and the law. The law schools have merely been tardy followers of the spirit and practice of the times. Of course there is bound to follow a lively and increased interest on the part of students. The law at once becomes for them, as in Mr. Choate's student days, a concrete thing, a part of human life itself. The dead letter of the books suddenly coming to life in this way, the student learns from day to day *how to apply* what knowledge he has acquired in his closet study and in his class rooms. He is constantly brought in contact—and contact is the greatest thing in life—with the people and their controversies, with the result that ethics, the *"what to do"* and the *"how to act,"* and the professional spirit itself, suddenly disclose themselves as fruit growing on the same stalk with

knowledge of the law. Knowledge of procedure and practice, as the mere machinery of this new activity, is thus acquired unconsciously, and, learned in this way, is never forgotten, because it seems a part of the very life of the law as the student comes to know it.

"At the very height of his powers, possessed of a matured vision and wisdom almost spiritual in their intensity and truth, Rufus Choate, in his great speech on "The Judicial Tenure," declared that *"he who would be a lawyer must unite the study of the books and the daily practice of the courts, or his very learning will lead him astray."* In that statement we find expressed the full purpose of the legal aid clinic. In these modern times, in no other way can the book-work of the student of law be united to the necessary vocational "shop-work" in the "daily practice of the courts" and in the daily contact with the life of the people."

If it be said, by way of objection, that such clinical opportunities, in numbers sufficient to satisfy the needs of a modern law school, can be found only in the larger communities, and, for many law schools, cannot be made available, the emphatic and conclusive answer readily suggests itself. It matters little where the college may be located, but an American law school, like a medical school, must go where adequate clinical opportunities exist. The *common law* does not develop and cannot be taught in a cloister, or, nowadays, in the provinces, or the smaller cities, or the ordinary college towns. It is not an abstraction, a thing of words and books, an autocratic prescription. It is wholly concrete, a growth from the life of our people, and can be taught only in constant contact with the throbbing life of the day. All our law schools should be found only in the greater centers of population, where the masses and the best of our people (fortunately or unfortunately) are now concentrating, and where the leading lawyers of our time are now established. Lawyers necessarily follow population and business, and American law schools must, perforce, take the same course. That must now become the rule, and yet we may admit (not inconsistently) that there are many of our ablest lawyers firmly attached to smaller communities, and that frequently our best arguments and best-prepared cases come from such communities. That, however, means nothing for present purposes. We are referring to the general and incontrovertible trend and drift of population and of lawyers. In the necessary following of this tendency and acceptance of this condition, the law schools, like the medical schools, and for precisely the same reasons, in their search for the indispensable clinical opportunities and materials, may often find it necessary to separate themselves, and perhaps at long distances, from their colleges or universities,—a perfectly feasible and natural operation.

As to the supply of legal aid clinical work, it may be said that there is not a community in the country whose legitimate legal aid activities, judged even by present standards, cannot, by the furnishing of proper funds and facilities, be more than quadrupled. This does not mean an encouragement of the litigious spirit. It means the supplying of the normal and natural demands and necessities of the people under our form of government. Now, we hang the golden apple of complete happiness just out of reach. Not understanding our system, the poor who come to us from Central European autocracies think we are, at times, worse than a monarchy, owing to our failure to furnish adequate opportunities for ascertaining, protecting, and vindicating the rights of persons and of property.

Of course, the exceptional student will secure his legal education, in other words, will get his law, anywhere and in any way, no matter what the system. We are speaking now, however, and are bound to provide in the future more adequately, for the average student and the average man.

Mr. Choate described the modern law office as a "specialty shop," as distinguished from an office for the general practice of law. The short, sharp, business-like methods of latter-day court practice, involving thin speech and thinner thought, excited his ridicule and wonder. How could the law develop in

such an atmosphere?—was his question. There was no enlightening flow of legal thought or learning, and, with the curt admonition,—"Counsel may have fifteen minutes on each side for summing up,"—his own jingle, with which he delighted to tickle the ears of juries, became inapplicable:

> If words are things, as Mirabeau declares,
> What monstrous loads come up these court-house stairs.

He regarded the common law as the people's law, growing case by case. He, like Mr. Evarts and James C. Carter, hated codifiers, codes, revisions and consolidations, as enemies of the normal growth of law. To systematizers of law, to Blackstone, Kent, Story, Stephens, Holmes, Wigmore, and Pound, he paid appreciative homage, but the professional unifier and codifier were to be regarded simply as blind and ignorant obstructionists in the way of right legal development. There can, as he held, be no natural growth of the common law, the only possible law for the people of a democracy, when such an obstruction constantly interferes. The common law, in his view, "that old code of freedom," as Rufus Choate described it, means, in itself, democracy, while written and enacted codes stand only for a form of autocracy,—man-made law created by the stroke of a pen, and handed down from above to the people as slavish instruments of selfish power.

If this law of the people, it was his idea, can be given only half a chance, by freely opening the courts to the people, with a resulting general practice, the law and legal education will really take care of themselves. Professorial, theoretical, or systematic law must always be neutralized by the people's point of view, seen though the eyes of the general practitioner. The people's intimate touch, the very commonness of the law, must be preserved by the courts' uninterrupted interpretations and the honest and competent lawyer's advice, case by case, in the course of general and unlimited practice,—in our day, through efficient legal aid work.

The compulsory association of the law schools with legal aid work, the adjustment of the curriculum, and the general plan of such association and co-operation, are simple problems. The reports of legal aid societies all show the extraordinary variety in the cases in which they are called upon to act, absolutely confirming what we have said as to the possibility of the complete restoration of a general practice and of the people's contact with their own law through the medium of such legal aid work. The work of law-school students can be readily extended to intensive summer work and to evening sessions with, and as a part of, the legal aid agencies or societies; and actual experience has already demonstrated, in the case of the Boston Legal Aid Society, under the able and inspiring leadership of its counsel, Mr. Reginald Heber Smith, and its devoted board of officers, that the intensive work of students during even a few weeks of the summer (and probably evening sessions, as at Copenhagen and elsewhere, would also serve the purpose) is of almost inestimable value, not only in the teaching of practice, but in the development of ethics, of *savoir-faire,* and of the professional spirit.

This latter point is most important. "Preparedness" is the topic of the hour. Day by day we are preaching and practising preparation for war and the waging of war. That is well. But there can be no efficient preparation for war, and no effective waging of war, without sound and efficient government, and that is impossible for us without trained and efficient public servants. Under our constitutional and legal system, lawyers have always been and necessarily always must be our governing and administrative class. For years we have been suffering from the overproduction of ill-prepared lawyers, from overlegislation, from badly drawn laws, and, frequently, from the inefficient and unsatisfactory working of our executive, legislative, judicial, and legal machinery,—all attributable to a distressing breakdown, during the past twenty or more years, in our legal educational work, in our requirements for admission to the bar, and in our general system, even with the assistance of modern legal aid agencies of administering the people's law for the people's benefit. We must make an end of these condi-

tions; and this, not merely from considerations of patriotism and the public welfare, but also out of regard for the purely selfish considerations of personal and individual comfort and private security.

We must never for one moment forget the great proportion of untrained and unsympathetic alien blood in the population and at the bar of all our large communities. This stock, largely from the code countries of Europe, brought with it an inherited and traditional hostility and a lack of instinctive adaptability to our institutions and our body of common law. That element, in coming to the bar, must be constantly trained, not merely in the nature of our law, by a broad common-law experience, but also in the matter of the professional spirit, which can grow only unconsciously through the medium of a general practice. The legal aid work, in its association with routine law-school instruction, will do more to promote the necessary right training and disciplining of this foreign element, than all other parts of the law-school curriculum combined.

Under these conditions, then, we must constantly keep before us, for consideration and action, the following vital questions: (1) The necessary relation of lawyers to the community, in this common-law country and under our American Constitutions, as our chief public servants of the governing or administrative class; (2) the consequent public demand for high and uniform standards in both preparatory and professional education (presumably, a college and law-school degree), and for the public regulation and supervision of all such education and of the qualifications for admission to the bar, — preferably through the medium of the courts of last resort, or a commission, and by constitutional provision, to prevent the constant and familiar legislative tinkering and local influences; (3) the development and constant extension and enlargement of legal aid work, including criminal or Public Defender work, as well as civil practice, as a necessary *public or state function*, and the removal of that work from the domain of charity or social service, with the consequent desirable restoration of the people's contact with their law; (4) the changes in professional practice and accommodations for students, making general clerkships and clinical experience for students impossible, and now requiring, for the benefit of students and the sound development of American common law throughout the country, the restoration of general practice conditions and common-law training, and, to that end, a compulsory association and co-operation, for students' clinical experience, between law schools and legal aid societies or agencies; (5) the requirement of a four-year course in all law schools, with earnest clinical work, through legal aid agencies, as a part of the curriculum in all four years,—not merely in the fourth or last year; (6) the granting by bar examiners of preferential consideration, in the required length of study or clerkship, to graduates of law schools with such clinical instruction; (7) the creation of a great Federal agency, possibly under a Federal charter,—an active and permanent Central Council of Legal Education,—which shall, with the aid of the American Bar Association, and, if need be, of the Supreme Court of the United States, co-ordinate legal educational activities and develop *high and uniform standards* throughout the country.

What medicine, on the footing of the Carnegie Foundation reports, has done so sanely and so well in the advancement of medical education, the law, with the help of the Foundation's similar reports, soon to be made, on legal education and legal aid work, reports which, it is understood, have been suggested and promoted, as to legal education, by Judge Henry Wade Rogers and the Committee on Legal Education of the American Bar Association, can also certainly accomplish with equal benefit to the cause of humanity, and with infinite advantage to the cause of good government and national progress. To that end, we bespeak the earnest co-operation of the courts, the bar, our law schools, and our citizenship at large.

William L. Rowe.

Patriotic Duties of the Bar*

BY BURRITT HAMILTON, ESQ.

President of the Michigan State Bar Association

THE late Judge Person, in his address as president of the Michigan State Bar Association in June, 1914, made a statement that now seems prophetic. "In the operation called evolution," he said, "when everything seems settled down to certain customs and habits of thought, there is undoubtedly a gradual growth and development of sentiment which is hardly perceived until it has gained sufficient force and impetus to break out in a sort of convulsion."

Within sixty days after these words were spoken, Prussian militarism, "a gradual growth and development . . . hardly perceived" on this side of the Atlantic, broke out in a convulsion. Feudalism, long pronounced dead by historians, flamed into barbarous life, and in a day, as it seemed, became reincarnated in the imperial German empire. The convulsion came, and it persists. Cosmos trembles as in primordial days when continental masses folded upward from the deep. Monarch after monarch abdicates. Out of the cataclysm emerges world democracy, through which, under God, men shall no longer exist for states, but states shall exist for men.

Stirred, but undaunted by the events of the hour; calmly appraising the principles involved and the gigantic forces in motion; without hysteria and without ostentation; deliberate in judgment and unswerving in purpose,—the bar is ready for the honorable performance of its duty to the country, even as in Colonial days, when gentlemen in queues, many of them lawyers, subscribed a certain Declaration of Independence, highly obnoxious to the prerogatives of kings.

Because the useful activities of the country must go on if we are to successfully sustain the war, and because the foundations of our industrial future must be continuously constructed if we are to escape misfortune after the war, we perceive that the battle line reaches every fireside; it is not "somewhere in France" alone, but here and now, laden with pressing duties for every man.

It may not be untimely to observe that the bar as a body shares with the Army and Navy the guardianship of the flag, for the flag is the bar in the same sense that it is the armies and the fleets. The flag symbolizes fair trial in the courts as truly as it represents heroic action on land and sea. All instrumentalities of justice—practice and procedure, constitutions and statutes, textbooks and decisions, rules, trials, records, arguments, briefs, the right of review, the final judgment—are woven into its fabric. It is the humblest juror and the highest court. It speaks all the wisdom of our laws, all the intelligence of bench and bar, from Judge John Marshall's day to this. From Belgium, from France, from vexed Atlantic lanes, its mandatory signal comes back to us, its ministers of justice, commanding that the confessed crimes of an imperial outlaw receive such sentence before the judgment seat of nations that law and order shall be re-established upon the rock of international conscience, sustained, not by supine protest, but by supreme power, now and for all time.

There can be no turning back. We must prepare for world events. To lead we must know the way.

It is not enough to-day that a lawyer be a psychological naturalist,—not enough that he can identify a motive by its tracks, stalk hidden facts, or trace an elusive principle to its den in printed

*Address delivered as President of the Michigan State Bar Association June 28, 1917.

leaves. True, he should be a student, but he must not permit the dust on his books to absorb the red blood in his veins. He must cultivate broadened sympathies and espouse new faith on "the saving grace of common sense." He must rectify his vision to conform to the clearer light. He must realize that law is closely analogous to a living, growing organism,—not a bed of fossiliferous remains. He must say to his library: "I bow to you, my books, out of respect for your tested worth and present authority; like the statue of a child, you are the fixed expression of a changing form; you are memory, but I am vision; you are history, but I am construction; you are guideboards upon traveled ways over which men pass to the frontiers of thought."

Always at the end of the beaten path pioneer juridical concepts struggle for existence. How may we best aid them? In general, most powerfully, perhaps, by the quiet performance of daily professional duties; by trying more cases in the office and fewer in the courts; by making settlement of controversies when reasonable settlement is possible; by stipulating undisputed facts and shortening trials; by preventing improvident appeals; by speeding up the machinery of the law office, which is a part of the machinery of justice; by stronger demand for ethical practice; by exerting our united influence toward less and better legislation; and by fostering fraternal relations among the members of the bar.

The bar is the preparatory school of the bench. Every lawyer is a potential judge, and whether or not he ever attains judicial honors, he must daily, in his practice of the law, exercise judicial functions. Suits brought must be first tried in the office, and in hundreds of his cases that never reach the courts, every lawyer must sit in final judgment. If, as we believe, the administration of justice is the keystone of our governmental structure, the development of the bar is an effective act of patriotism.

We cannot do too much for our country. If, as we fondly hope, the United States is to be accepted as the model form of democracy, we must leave nothing undone to make good our claims in the eyes of all nations. In this the bar has a part to perform. Never before has so much law been in the making. Every state in our Union is a legislative experimental station; in every civilized country systems are undergoing swift and fundamental change. England, for the emergency of war, has set up what may be termed a commission form of government. There a few able and devoted men have become, not the power behind the throne, but the power above the throne. A new Russia is being forged under the hammer of Titanic events. The same is true of China, and, perhaps, of Germany.

The interdependence of civilized nations is at last understood. Nations one with us in spirit are no longer foreign countries. Identical purposes speak a common language. An alliance for war is to become an alliance for peace. A new international law is to be born. The united faith and strength of free nations is to assure the inviolability of treaties. "Scraps of paper" are to be respected, and no nation shall be permitted to revert to its primitive savagery at command of a dominant criminal will.

There has been an awakening. Craft in the air and under sea, the last stand of feudalism, the propaganda of "frightfulness," piracies fit for the darkest ages, sacrifices worthy mankind's noblest ideals, death in new forms, and dreams of new liberty, stir the imagination of mankind.

In these cataclysms, the bench and bar must steadfastly remain the gyroscope of government, the stabilizer of society. We must meet and master new conditions. The privilege of leadership must be bought and paid for in personal sacrifices. The authors of the American Constitution had no greater opportunity, for while force and arms shall "make the world safe for democracy," no influence save good laws wisely administered can keep democracy safe for the world.

*War Powers of the President**

BY HON. THOMAS J. WALSH

United States Senator from Montana

IN times of extraordinary peril to the Republic, generally in consequence of the exigencies of war, it was customary in ancient Rome to appoint a dictator who, for a brief period, never longer than six months, exercised supreme power. He was a temporary despot, armed with full authority to adopt what measures he thought expedient, without consulting the Senate, and to dispose of the lives and fortunes of the citizens without appeal.

As an institution, the dictatorship has generally been regarded as a restoration *pro hac vice* of the regal authority. The belief has been indulged that resort to it by the Romans amounted to a confession on their part that a republican form of government is unsuited to the stern necessity of a war involving the national life.

The very name by which the official was designated, who thus exercised over his fellow citizens the power of life and death, has become odious. The most autocratic ruler of our times would resent being referred to as a dictator, though at one time the chief executive of some of the South American republics assumed that title.

Machiavelli considered the dictatorship, however, as one of the most essential features of the republican Constitution of Rome, and one which contributed most to the greatness of the state. His views are thus paraphrased by a modern writer:

> Popular governments particularly need provision for prompt and efficient action in critical times, from the fact that the normal action of the administration, requiring co-operation as it does of many wills, is feeble and slow. If the Constitution does not provide for the necessary concentration of authority, the Constitution will be broken when the stress comes, and the requisite action will be taken regardless of the fundamental law. Thus, however, a precedent will be created in a good cause which may later be followed in a bad. The Roman dictatorship, therefore, carefully limited as it was by well-defined methods of creation and termination, furnishes a model for all free governments.

Macauley was not able to dispel the suspicion with which anything emanating from the Florentine philosopher is quite universally regarded, yet an eminent American commentator upon political theories, ancient and modern, William A. Dunning, professor of political science in Columbia University, remarks, concerning the sage reflections to which your attention has been invited, that "this judgment upon the necessity of dictatorial power in republics was as sound as it is unusual."

If it be true that to promote the success of the war the President is being invested with the sweeping authority with which a dictator was clothed, as some timorous souls and captious critics proclaim, it does not follow that there is any departure from the just principles upon which republican institutions rest, nor that any violence is being done to the Constitution through which our liberties are made secure.

It is certain that powers startlingly vast have been and are being conferred upon him, so extensive, as compared with those ordinarily exercised by the Chief Executive, or even with those ever delegated any President, that a catalogue and review of the acts approved and bills under consideration by which the investiture has been or is to be accomplished cannot fail to awaken your interest. If the enumeration shall excite, I trust the discussion may allay, your alarm.

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*Address delivered before the North Carolina State Bar Association at Asheville on July 4, 1917.

1. By the Army Reorganization Act, approved June 9, 1916, the President is authorized in time of war or when war is imminent to order any individual or institution having the facilities to comply, to furnish any supplies or equipment for the Army he may order, in preference to any other commitments, at a price to be named by him. In case of default he may seize and operate the plant.

2. By the same act he is authorized to construct and operate a nitrate plant, and to develop and install a hydroelectric system to furnish power necessary to the operation of such plant.

3. By the Army Appropriation Bill, approved August 29, 1916, the President was empowered, in time of war, to take possession, assume control, and utilize, in whole or in part, any railroad system for the movement of troops, or for any other purpose connected with the emergency.

4. By the Navy Appropriation Bill, approved March 4, 1917, the President may, in time of war, command any person or corporation having the facilities to comply, to produce for, or deliver to, the government ships or any war material, prior commitments notwithstanding. In case of refusal he may seize and operate the shipyard or other plant controlled by the recusant.

5. By the so-called Espionage Act, approved June 15, 1917, the President may:

a. In case of war or threatened war direct the seizure of any vessel in our waters, remove the officers and men therefrom, put others in charge, and exclude from it any persons not specially authorized by him.

b. In time of war or national emergency forbid anyone to enter upon or fly over any place in which anything is being prepared, constructed, or stored for the use of the Army or Navy.

c. During the present war forbid exportations except at such time or times and under such regulations and orders and subject to such limitations and exceptions as he may prescribe.

6. By the Act of May 12, 1917, the President was authorized to seize every enemy vessel in our ports and to operate the same.

7. The selective Draft Act does not require, but authorizes, the President to raise the great Army which we are now assembling, and to devise and call into being much of the administrative machinery through which the additional troops are to be secured. It vested in him discretion to accept or reject Colonel Roosevelt's offer to raise one or more divisions of volunteers, and gave him authority to exempt many classes at will from the draft and to make regulations to free military camps from the evils of easy access to saloons.

8. A bill which has passed the Senate, generally referred to as the food survey bill, authorizes the President at any time during the war to close grain exchanges which decline or neglect to purge their transactions of operations in futures.

9. Another has passed the House which rests in the President full control, through rules and regulations to be promulgated by him, over the manufacture, shipment, sale, and distribution of high explosives.

10. Another bill, which has received the sanction of both houses, empowers the President during the war to direct that preference in shipment be given to any commodities the movement of which he may deem it wise to expedite.

11. Food control bills, now under consideration in both Houses of Congress, authorize the President during the war—

a. To license the importation, exportation, manufacture, storage, or distribution of food, feed, and fuel; to prescribe regulations governing the business of licensee, violations of which are punishable criminally.

b. To purchase such necessaries at a price to be fixed by him, or by proceedings in court if the owner is dissatisfied, and to sell them; and to require any person having storage facilities to supply the same for the keeping or preservation of any necessaries so purchased, compensation being made in like manner.

c. To requisition and take over any factory, mine, or other plant in which such necessaries may be manufactured, produced, prepared, or mined, similar provision being made for compensation.

d. To make regulations governing operations on boards of trade and grain exchanges, observance of such being assured by penal provisions.

e. To guarantee a minimum price for agricultural products.

f. To prohibit the use of foodstuffs in the production of beverages, alcoholic or nonalcoholic.

The foregoing list is not exhaustive, but is sufficiently portentous.

Of the necessity or wisdom of this legislation it is scarcely appropriate that much be here and now said. The history of the chapter of the Espionage Act authorizing the President to declare embargoes may move those to suspend judgment who might be disposed to be critical. By a very decisive vote the Senate substituted for the language of the bill giving to the President plenary power a restrictive amendment offered by the senior Senator from Georgia, providing that whenever the President should determine that exports to any neutral country were finding their way to the enemy he might interdict shipments to such country. Thereafter Senator Martin, majority leader, moved a reconsideration of the vote, asking an executive session; and when the doors were again opened the Senate had restored and approved the language of the bill as it had been reported by the committee.

Consideration of the power to enact legislation such as that referred to is more appropriate to the present occasion, however interesting might be a recital of the reasons urged for and against it, or a justification from a standpoint of public policy of those who advocated it. It was quite generally assailed as violative of constitutional limitations, in many of its features, with vigor, ability, and persistence. And it must be admitted that the fate of much of it, when it shall ultimately be tried out in the courts, is involved in no little doubt. As a whole, it must be sustained, if it is to be sustained at all, as a legitimate exercise of the war power of Congress. Elaborate arguments appear in the Congressional Record in justification of the food control bill,—most of them the work of gentlemen not members of either House,—in which is advanced the view that that measure is warranted by the interstate and foreign commerce clause of § 8 of art. 1. But the contention is idle, as the bill is framed on no such theory. It contemplates an administration of all the food and fuel resources of the country, that part which never leaves the state in which it is produced, as well as that which passes into interstate or foreign commerce. More in detail concerning that particular measure hereafter. It suffices for the present to say that if it cannot be sustained under the war power it must fall. Jefferson declared that he had stretched the Constitution until it cracked to effect the Louisiana Purchase. Let us pursue the inquiry as to whether the fundamental law has been thus far unduly strained to win the war against Germany.

The war power is vested in Congress through the following provisions of the Constitution:

> Congress shall have power—
> To declare war, grant letters of marque and reprisal and make rules concerning captures on land and water.
> To raise and support armies.
> To provide and maintain a navy.
> To make rules for the government and regulation of the land and naval forces.
> To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.
> To provide for organizing, arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States.

An obligation on the part of the Nation to wage war is implied in § 4 of art. 4, which provides that—

> The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

It is equally implied in the last paragraph of § 10 of art. 1, as follows:

> No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay,—

and the obligation is enforced by the inhibition of the first paragraph of the same section, as follows:

> No state shall enter into any treaty, alliance, or confederation, (or) grant letters of marque and reprisal.

Perhaps if no mention of the subject had been made in the Constitution at all, the power to defend itself by force of arms would be deduced from the fact that by that instrument a nation had been created. The right of self-preservation would be easily inferred. That the nation, the Federal government, was to wage war whenever resort to the arbitrament of arms became necessary or unavoidable is a necessary conclusion from the whole scheme of government designed by the framers of the Constitution. It, accordingly, made the President the Commander in Chief of the Army and Navy of the United States and of the militia of the several states when called into actual service of the United States.

That this is a tremendous power which has been thus vested in Congress, no one can doubt; that in the granting of it a wide field of legislation was opened to Congress must be recognized, a field the limits of which, so far as they can be scanned by the judicial eye, expands with the ever-increasing complexity of the life we call, or once called, civilized, and the development of military science. It must be clear that it was intended that, so far as the necessities of the case required, any war in which the Republic might be engaged should be waged with all the power and the resources it could command, and that Congress must have been endowed with power to utilize them to the limit to bring the conflict to a speedy and successful issue.

It could not have been considered that it would be necessary, and accordingly no authority was granted, to effect any radical change in our system of government, but, short of that, it must have been the purpose of those who took from the states the power to wage war and lodged it in the national government, to endow that government with all the authority necessary to bring a war in which it might engage to a successful conclusion, —at least, all such authority as had customarily been exercised by democratic governments to such an end, and particularly by the government of Great Britain, whose system was uppermost in the minds of the men who gave us our Constitution. Von Holst says that the clause which makes the President Commander in Chief of the Army and Navy of the United States invests him, as such, with all the power which the King of England enjoyed as the commander of the land and naval forces of the United Kingdom. Willoughby says, § 715:

> The constitutional power given to the United States to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion. When dealing with the enemy all acts that are calculated to advance this end are legal. Indeed, the President in the exercise simply of his authority as Commander in Chief of the Army and Navy may, unless prohibited by congressional statute, commit or authorize acts not warranted by commonly received principles of international law; and Congress may by law authorize measures which the courts must recognize as valid, even though they provide penalties not supported by the general usage of nations in the conduct of war. Thus, during the Civil War, in certain cases the provision by congressional statute for the confiscation of certain enemy property or land was enforced, though such confiscation was not in accordance with the general usage of foreign States.
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> Even in dealing with its own loyal subjects, the power to wage war enables the government to override in many particulars private rights which in time of peace are inviolable.
>
> The power to wage war carries with it the authority not only to bring it to a full conclusion, but, after the cessation of active military operations, to take measures to provide against its renewal. As the court says in Stewart v. Kahn: "The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

The case referred to (Stewart v. Kahn), is found in 11 Wall. 493, 20 L. ed. 176.

The power to wage war having been conferred upon Congress, the further power is expressly granted by the last paragraph of § 8 of art. 1 of the Constitution to "make all laws which shall be necessary or proper" to carry into execution such authority. What measure may be necessary or proper, in the language of the Supreme Court in the case referred to, rests wholly in the discretion of Congress. "Let the end be legitimate," Marshall said in McCulloch v. Maryland, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapt-

ed to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. 421, 4 L. ed. 605.

It is not necessarily fatal to an act of Congress passed pursuant to the war power that it curtails the rights of the citizen as they are ordinarily enjoyed in times of prosperous peace. Few of our rights are altogether unlimited, even those guaranteed by the first ten Amendments to the Constitution. Of these it was said in Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, that:

> They were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion, United States v. Ball, 163 U. S. 662, 672, 41 L. ed. 300, 303, 16 Sup. Ct. Rep. 1192; nor does the provision of the same article, that no one shall be a witness against himself, impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644, and cases cited. Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

It may be justifiable to dwell in this connection, for the purpose of enforcing the point made, on the so-called censorship clause of the espionage bill, eventually rejected by Congress, repeatedly declared in the effective newspaper campaign waged against it, and quite commonly believed, to be violative of the 1st Amendment, forbidding the enactment of any law abridging the freedom of speech or of the press.

In the form in which it was finally voted on in the Senate it read as follows:

> In time of war, the President is hereby authorized to prescribe and promulgate rules and regulations for the purpose of preventing the disclosure to the public, and thereby to the enemy, of information with respect to the movement, numbers, description and disposition of any of the armed forces of the United States in naval and military operations, or with respect to any works intended for the fortification or defense of any place; and whoever, in time of war, shall wilfully violate any such rule or regulation shall be punished by a fine of not more than $10,000, or by imprisonment for not more than five years or by both such fine and imprisonment: *Provided,* That nothing in this section shall be construed to limit or restrict, nor shall any regulation herein provided for limit or restrict, any discussion, comment, or criticism of the acts or policies of the government or its representatives, or the publication of the same.

The conference committee recommended the following:

> When the United States is at war, the publishing wilfully of information with respect to the movement, numbers, description, or disposition of any of the armed forces of the United States in naval or military operations, or with respect to any of the works intended for the fortification or defense of any place, which information is useful to the enemy, is hereby prohibited; and the President may from time to time by proclamation declare the character of such above described information which in his opinion is not useful to the enemy, and thereupon it shall be lawful to publish the same. In any prosecution hereunder the jury trying the cause shall determine not only whether the defendant did wilfully publish such information but also whether such information was of such character as to be useful to the enemy.

It will be noted that no provision was at any time made for the appointment of a censor, nor was any authority to be given to any one to blue-pencil any newspaper, or prohibit in advance the publication of any matter its managers might choose to insert in it. The proposed law made it penal to publish information concerning the movement of the troops and news of like character, that, reaching the enemy, might prove disastrous to our cause. Does the freedom of the press imply the right to print without penal responsibility such information?

Possibly at this very hour some thousands of the gallant sons of this state are embarking on transports on their way to the western front. Can it be that there is no power in the Federal government to protect the men thus called to the service of the nation, from ruthless destruction at sea by enemy submarines, by appropriate legislation, making it a penal offense to make public through the press when they depart, by what route they travel, and by what convoy they are guarded? It is no answer to say that the newspapers of the country will patriotically refrain, have refrained, from publishing such news, interesting as it would prove to their readers. Why should we take the risk that every newspaper will resist the chance to make a "scoop?" Besides, the loyalty of a few newspapers published in this country, only a few, and those of no great character, is not above suspicion. Why should we not hold all such strictly responsible for the publication of information that may spell some horrible disaster to our forces? These comments may seem a defense of the policy of the statute rather than an exposition of the power to enact it, but they are made to enforce the point that the freedom of the press does not imply the right to print anything and everything.

It does not, and no one will contend that it does, extend so far as to warrant the publication, or to afford immunity for the publication of, matter that is libelous, or obscene, or blasphemous. Similar provisions in state Constitutions do not invalidate laws that forbid the circulation of papers carrying advertisements to promote the sale of intoxicating liquors, or noxious drugs, or other articles the indiscriminate sale of which is by the lawmaking power justly held to be inimical to the public welfare. A number of the states have prohibited the sale of newspapers devoted largely to the publication of scandals, immoral occurrences, and the like. These prohibitory statutes have been uniformly upheld, the decisions fully justifying the declaration of a standard work, that "it is universally conceded that there is some limitation of the right of free speech and free press. Such limitation is fixed by common-law principles and statutory declarations of the police power." The same authority continues, "Statutes required to protect the public morals or general welfare of the people do not infringe this constitutional right." 8 Cyc. 892.

Cooley declares that the constitutional guaranty does not extend to "publications injurious to private character, or public morals or safety." Cooley, Const. Lim. 615.

Story, in combating the idea that the press is subject to no legislative restraint, inquires: "Is it contended that the liberty of the press is so much more valuable than all other rights in society, that the public safety, nay, the existence of the government itself, is to yield to it? Is private redress for libels and calumny more important or more valuable than the maintenance of good order, peace, and safety of society?" Story, 1887. Following the discussion, he observes that the "right of government to punish the violators of these 'public rights and public liberties' flows from the primary duty of self-preservation."

One Johann Most, a product of the kind of government to preserve the world from which we have entered into the present war, held a latitudinarian view of the free press Amendment to the Constitution, but the court of appeals of New York refused to accept his idea that it protected him in the promulgation through his newspaper of the notion that the evils of society were to be redressed through murder and assassination. Commenting on the principle to which he appealed, that court said: "It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standards of the common law. It does not deprive the state of the primary right of self-preservation."

As there is an implied limitation on the right to speak and print, arising from a condition of war, so there is a limitation on the right to contract guaranteed by the 5th and the 14th Amendments.

It has been held that the right to dispose of one's property is of the essence of the right to his property and is protected by the due process clause of the Amendments referred to. Its compre-

hensive character was expounded in Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, as follows:

> The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Yet contracting with the enemy in time of war cannot be tolerated, and before Congress adjourns it will pass a "trading with the enemy act," making all commercial intercourse with alien enemies criminal. Indeed, it was said in Knoxville Iron Co. v. Harbison, 183 U. S. 22, 46 L. ed. 61, 22 Sup. Ct. Rep. 1, that "the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants."

In fact, all our prized liberties, so carefully guarded by the first ten Amendments to the Constitution, are held subject to the all-embracing war power of Congress. Confiscation statutes passed during the Civil War were assailed in Miller v. United States, 11 Wall. 268, 20 L. ed. 135, as contrary to the 4th and 5th Amendments. Touching the contention made in that behalf, the court said:

> But if the assumption of the plaintiff in error is not well made, if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States, if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the 5th and 6th Amendments. This we understand to have been conceded in the argument.

The court then entered upon an inquiry as to whether the acts in question came within the compass of the war power, and, finding they did, sustained their validity, and in that connection said:

> Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.

While there was a dissenting opinion in that case, the principle announced in the majority opinion, as recited above, is not only approved but elaborated in that filed by the justices withholding their assent from the judgment, Justice Field saying:

> It is evident that legislation founded upon the war powers of the government, and directed against the public enemies of the United States, is subject to different considerations and limitations from those applicable to legislation founded upon the municipal power of the government and directed against criminals. Legislation in the former case is subject to no limitations, except such as are imposed by the law of nations in the conduct of war. Legislation in the latter case is subject to all the limitations prescribed by the Constitution for the protection of the citizen against hasty and indiscriminate accusation, and which insure to him, when accused, a speedy and public trial by a jury of his peers.
>
> The war powers of the government have no express limitation in the Constitution, and the only limitation to which their exercise is subject is the law of nations.

That the provision that Congress shall pass no law depriving one of life, liberty, or property without due process of law did not forbid the confiscation of the property of an alien enemy by direct legislative act was decided by the Supreme Court in Brown v. United States, 8 Cranch, 120, 3 L. ed. 508.

In fact, the great writ of liberty itself may be suspended when, in case of rebellion or invasion, the public safety may require it. Other rights appertaining to the person of the citizen are at best but shadowy if he cannot secure a writ of habeas corpus for the purpose of having an inquiry into the cause of his detention. The Constitution recognizes the right to suspend the writ as falling within the powers granted to Congress by § 8, the war powers heretofore referred to. The succeeding section, in which reference is made to the writ, imposes limitations upon Congress and sets bounds to powers granted.

Not only the rights of individuals but the rights of the states may be restricted in the exercise of the war power by Congress. The case of Stewart v. Kahn, 11

Wall. 493, 20 L. ed. 176, heretofore referred to, is illustrative.

The right of a state to make laws regulating the procedure in its courts, and particularly to enact Statutes of Limitation, is recognized as fundamental in our systems. Equally indisputable is the proposition that in normal times the Federal government has no right to prescribe rules for the conduct of business in state courts, to enact Statutes of Limitation to be observed by them, or laws that operate to toll those the state commands its courts to observe. Yet the Supreme Court in the case referred to, in an opinion assented to by all the judges, sanctioned an act of Congress passed in 1864, which provided that, any statute of a state resisting the Federal authority by force of arms to the contrary notwithstanding, no suitor should be denied a recovery in its courts because of delay in bringing his action occasioned by conditions growing out of the state of war. That law, it was held, was enacted in a proper exercise of the war power; the court remarking, as quoted by Willoughby, that "the measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

It is not at all improbable that in the administration of the act authorizing the President to lay embargoes, a preference may be given to the ports of one state over those of another. It is conceivable that the submarine menace may grow so alarming as to make it necessary to assemble merchant ships undertaking transatlantic voyages at one or more ports, from which convoy shall be provided, as was customary with the nations uniting in the Armed Neutrality League during the troubles out of which it grew.

It may be prudent to forbid the departure of vessels for Europe from any other port, that the precious cargoes they might carry of food and supplies for the armies of the Allies in the field and their civilian population might not be on the voyage "in the deep bosom of the ocean buried." It may become advisable to refuse insurance under the War Risk Insurance Act, except to vessels thus sailing from the ports from which convoy is to be furnished, or following lanes patrolled by the destroyer craft of the Allies. It is scarcely to be conceived that the authors of the Constitution intended that Congress should be hampered in the exercise of the war power by the provision of § 9 of art. 1 referred to. In other words, many of the restrictions and limitations of the Constitution are to be understood as yielding to the necessary, that is to say, the appropriate, exercise of the power conferred on Congress to make war, the right of self-preservation being paramount.

This does not mean that the Constitution or any of its provisions are suspended during war. It merely means that an exception is to be implied in all cases in which a conflict arises through the legitimate exercise of the war power which Congress is charged by the solemn adjuration of the Constitution to wield. It is not strange, perhaps, that, having lived the peaceful career that has characterized our nation, the depths of the vast war power never having been sounded except during our unfortunate civil strife, an impression should obtain that Congress is proceeding in total disregard, if not in defiance, of the Constitution, effecting a revolution in our system of government. But it is in the light of the adjudications to which reference has been made, in recognition of what the war power means, that the measures attacked must be considered.

If the food control bill is not vulnerable it will be vain to assail any other unit of the war legislation. It authorizes the President, as it was passed by the House, to buy and sell food and fuel, denominated as "necessaries;" to license any one engaged in the importation, exportation, or storage of such necessaries, and to make rules and regulations under which the business of such licensee shall be carried on; to guarantee a minimum price to the producers of nonperishable agricultural products; to regulate or suppress hoarding of and transactions in such necessaries on boards of trade, and to prohibit the use of foodstuffs in the production of alcoholic beverages.

Read in the light of prevailing condi-

tions and current history, of which the court takes judicial notice, the purpose of the bill is to stimulate the production, and to conserve, the food and fuel resources of the nation. The productive capacity of our allies has been materially reduced by the ravages of three years of war. They maintain enormous armies in the field, made up, for the larger part, of men who would normally be employed in the basic industries. Multitudes who, had peace prevailed, would be tilling the fields, "sleep the sleep that knows no waking," and others, in distressing numbers, are helpless cripples. Still others, making a veritable army in point of numbers, are drawn from their ordinary avocations to produce the horrible enginery of war. The capacity of the countries associated with us is overtaxed to produce food and fuel, at least, adequate to meet the demands of the occasion. Even in normal times they draw largely on foreign supplies for food not now available to them because of the exigencies of the war. Their soldiers fighting our battles, their people who by their labor maintain the forces in the field, must lose their efficiency unless nurtured with food which we alone can supply. Famine among them would be more deadly than all the fiendish ingenuity and ferocious valor of the common foe. The right of our government to supply their troops with the necessary munitions cannot be doubted, and if munitions for the Army then certainly food for the Army, and as well for the civilian population that must have it to conduct the industries through the operation of which alone the Army can maintain its existence as such. No one questions our right to supply them with money, by way of loan, that they may more effectively carry on the war; and if we may supply them with money, why not with food, as an appropriate means of bringing ultimate success to their and our arms?

As indicative of the extent to which they are obliged to rely upon us for subsistence, note the following table of our exports of foodstuffs for the past five years: 1912, $418,737,763; 1913, $503,111,639; 1914, $430,713,457; 1915, $961,568,583; 1916, $979,697,253; 1917 (to April 30), $992,777,056.

Prominent in the strategy of the war, taking perhaps first place in it, is the effort of each side to shut off the food supplies of the other. To this end the Allies maintain their blockade of the German ports and the Central Powers carry on their relentless submarine operations. Argosies from our shores laden with foodstuffs have sunk beneath the waves, victims of the assassins of the seas. It is the part of prudence to assume that our losses from that source may increase. Every cargo that goes down must be made up from our store, or the pinch of want will be felt among the people whose necessities it was destined to relieve.

Unfortunately, the reports reaching us concerning the condition of the crop in the countries with which we are allied are not reassuring. All or nearly all of them drew on Germany for their potash, an essential ingredient of most fertilizers. We have been importing 250,000 tons of potassium salts from Germany annually, most of it for use in the production of fertilizer extensively used in all the eastern and southern states. That country has hitherto enjoyed a practical monopoly of that mineral, and now that none of it is obtainable from the ordinary source the price of potash has risen from $35 to $475 per ton, a price that makes the use of it for agricultural purposes prohibitive.

We are building an enormous fleet of merchant vessels, the construction of which will involve the expenditure of three-quarters of a billion dollars, that we may get supplies, largely foodstuffs, to the people with whom destiny has, for the time being, linked us.

It can scarcely be doubted that it is within the power of Congress, under the circumstances, to stimulate the production of cereals, that there may be a surplus which the ships being constructed under its authority may carry to the nations battling with us to "make the world safe for democracy." But the necessities of the situation are not met if we do no more than increase production. Britain, France, Italy, and Portugal, among our allies, are all clamoring for bread which we alone can supply; and unfortunately jealousies have been

aroused among them, in their eagerness, springing from their necessities, to make ample provision for their people respectively. It is well known that the spectacular rise in the price of wheat in May last, when it reached $3.40 in Chicago, was occasioned by the placing of large orders by the government of one of those countries and through the competition in which they engaged with each other. If there is not a phenomenal crop, sufficiently bounteous to supply fully all needs, and dealing is unregulated, they will bid against each other and buy at famine prices with money loaned to them by our government. Moreover, the neutral nations of Europe have scarcely been less clamorous. In normal times they import foodstuffs in vast quantity from our shores, and to no little extent their rural populations, as in the countries at war, have been drawn into the industries other than agriculture, that have felt the stimulating effect of war demands. Switzerland, Denmark, and Sweden have each sent deputations to present to our government the necessities of their people in the matter of foodstuffs, and to urge governmental action here or to cultivate public opinion looking toward more liberal treatment of their people in their efforts to secure a part of our surplus. If we should allow importers from those countries to compete unrestrictedly in our markets it might be that, their resources not having been wasted by the war, our allies would be outbid by them, and the people of the former suffer from the lack of nourishment necessary to enable them most efficiently to prosecute the war. And finally, it is easily conceivable that in the dire straits to which they may be reduced, they, with the neutral nations, may draw off so large a part of our crop that want, the fruitful parent of social disorder, would stalk through our crowded industrial centers, and riot and revolution follow in its wake. At the approach of such conditions hoarding would be resorted to and the evil intensified, while the food speculator would find the season propitious for the prosecution of his business in its most nefarious form.

The food control bill provides, as heretofore stated, for licensing all persons through whose hands foodstuffs pass after leaving the farm, and for the conduct of their business under regulations to be prescribed by the President. It authorizes him to buy, at a price to be named by him, or by the district court in case his price is not accepted, and to sell at his discretion. If it may be fairly argued that such procedure is calculated more certainly to bring the war to a speedy and successful conclusion, the act which authorizes it is within the powers of Congress. Justification for it need not be found in any other provision of the Constitution. It is sufficient that it is an appropriate war measure within the scope of the powers enumerated in the Constitution authorizing the national government to wage war.

It is advanced, however, that a feature found in the food bill, and others, authorizing the President to make rules and regulations having the force of law, the violation of which is punishable as a penal offense, is an unwarranted delegation by Congress. But this objection is so completely answered by the decision in United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480, that it is quite unnecessary to dwell upon it. In that case an act of Congress was sustained making it punishable to violate rules and regulations prescribed by the Secretary of Agriculture concerning the use of the forest reserves.

Some members of Congress, feeling a genuine alarm at intrusting to one man, however able and patriotic he might be, the vast power given and being given to President Wilson by the legislation reviewed, made a vain effort, in the case of some of the measures, to intrust the administration of the law to a board; but it found no great favor anywhere, and was practically abandoned. It was quite urgently insisted upon for a time in connection with the railway bill by which the President was authorized to direct that a priority in shipment be given certain commodities or consignments. But it was speedily recognized by all that as to the movements of troops, equipment, and supplies, the President and his representatives at the head of the Army and Navy Departments ought not

to be required to go before a board to establish that the military situation required that priority be given such freight, either generally or in specific instances. So it was soon appreciated that it would be impracticable to require an order from such a board to expedite the shipment of coal to munitions factories, or steel to shipyards, or a multitude of articles necessary in manufactories engaged in supplying the government with arms and equipment. Such a board would be obliged to hear representatives of the Army and the Navy Departments on the urgency of the case, and possibly interested parties in opposition. The whole strategy of war would have to be unfolded to such a board, whose views might not coincide with those of the men actually directing it. It might at any time become necessary to hurry a consignment of flour to France because of conditions in that country with which the President had become familiar through the State, War, and Navy Departments. It would be intolerable to have an administrative board determining against the Commander in Chief that the exigencies of the situation did not require the expedition for which he asked. The more the plan was studied the less practical and practicable it appeared, and it was rejected eventually by an overwhelming vote.

For like reasons it will be recognized that the power to proclaim an embargo upon exports to any particular foreign country, neutral or ally, could not be reposed in a board which might decline to accept the view of the President concerning the necessity or propriety of a line of action either was desirous of pursuing. Should there seem to be occasion for holding suspected persons against whom no substantial proof can be adduced, it is more than likely that, as in the war between the states, the President will be authorized to make due proclamation of the suspension of the writ of habeas corpus. It seems that when authority is to be exercised under acts of Congress justifiable only as war legislation, or designed to aid in bringing the conflict to a speedy close, it can be nowhere so appropriately lodged as in the Commander in Chief of the Army and Navy, upon whom rests the responsibility for the military operations as a whole.

I have heard Senators, Republicans as well as Democrats, confess to arriving in the morning at the chamber swearing they would never consent to giving a particular power to the President in connection with the war, to depart in the evening in a more pliant mood, and returning next day to vote for the further grant. And so it is being demonstrated, in the grandest Republic of modern times, that they were long-headed statesmen, who designed the Constitution of the greatest Republic of the ancient world.

The Roman people never had cause to feel that the Republic had suffered or its virility or permanency been impaired because, when the enemy were at their gates, the word of Cincinnatus was made the supreme law. Neither have the American people any just ground for apprehension that Woodrow Wilson will seek to retain, or the Congress of the United States hesitate to recall, the extraordinary powers with which it has invested him, when the occasion for their use shall have happily passed away and a triumphant democracy shall have assured a lasting peace to the world.

*Right of States to Pass Local Laws in Conflict with Treaties with Foreign Powers**

BY C. B. BIRD

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HIS is the topic given me for discussion. Noting the words, "right" and "in conflict," there is nothing to discuss. No state has any right to pass any law which conflicts with an existing treaty.

The Federal Constitution, so far as it speaks, is our highest law.

It provides:

> No state shall enter into any treaty, alliance, or confederation;
>
> Nor enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay. Art. 1, § 10.

Then among the powers granted to the Executive is the following:

> He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur. Art. 2, § 2 (2).

Then the Constitution further provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States,—shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the cnotrary notwithstanding. Art. 6.

Language could hardly be plainer. These constitutional provisions and the long line of decisions under them make plain the supremacy of any Federal treaty over any state Constitution or statute.

In view of the late discussion concerning the Japanese-California question, it is well to consider the matter further. Many have treated the western problem as new. It is not. California and Oregon, some thirty years ago, raised similar questions, and they were specifically decided by the Federal courts in those states. Those cases went no further, because the logic of the decisions was too plain to justify appeal. I will refer to them later.

The question, however, does suggest the extent of the treaty-making power. If the President, the Senate concurring, assume to enter into a treaty, but acts beyond his delegated power, then any conflicting state law will prevail, not because it is paramount to a valid treaty, but because there is no valid treaty. The scope of an agent's authority is always a subject of inquiry. Searching authorities for limitations upon this power, we find that thus far no treaty which our government has assumed to make has ever been held by our Supreme Court to have been *ultra vires*. Some treaties have been construed contrary to what some parties have claimed for them, on the theory that the court did not think Congress intended by them to invade certain state rights, but none has been held void because any state rights limited the power.

The scope of the power must be found in the constitutional definition.

Examining the constitutional grant of powers generally, we find as to most of such granted powers express limitations.

The Executive is granted certain specific powers. The two which find their definition in the grant themselves are that making him Commander in Chief of the Army and Navy, and that giving him power to make treaties. His authority as Commander in Chief is limited by at least one prohibition; to wit, against quartering soldiers in any house in time of peace without the owner's consent, or

* Address delivered at the recent meeting of the Wisconsin State Bar Association.

in time of war except in the manner prescribed by law.

The judicial power is granted without definition other than such as the words imply, but the subjects to which it extends are specifically stated. The Constitution then contains numerous prohibitions upon the way judicial power shall be exercised.

The legislative power is specifically outlined. The subjects upon which Congress may act are expressly stated. Lest others might be implied, the Bill of Rights expressly says that all other powers are reserved to the states. Then, within those admitted powers, numerous express limitations are made; Congress shall make no law concerning religious rights, abridging the freedom of speech or of the press, or the right of assembly or petition, etc.

Then, in order that Federal power may not be interfered with, and that the citizens may not be disturbed by any state in the exercise of certain rights, there is a lengthy list of prohibitions upon the power of the states to do certain things.

This recital of powers and limitations is elementary and trite. It is made to emphasize the fact that, whereas the Constitution gives to the Federal authority and prohibits to the states the power to make treaties, it nowhere in any manner limits the subject-matter or the terms of those treaties.

The necessary rule of construction requires us to examine the then existing subject-matter and usual terms of treaties as customarily made by sovereign nations. That investigation shows treaties with reference to commercial relations, rights of citizens of one country to live and hold property in another, the acquisition and cession of territory, punishment of citizens of one country for acts against the dignity of the other, surrender of persons for trial in foreign courts, payment of indemnities, pledges of territory and jurisdiction over citizens within them as security for promised indemnity, and even the surrender of national existence. This inquiry develops no limitations upon the subject-matter or the terms of the treaty-making power as exercised by sovereigns. Sometimes treaties have been entered into by negotiation at arm's length; sometimes they have been compelled by overwhelming force.

Are there then no limitations in our government? Have we granted the President the power, if two thirds of the Senate concur, to contract some of our citizens into slavery on foreign soil in order to acquire for the rest of us desirable rights? May this treaty power make, and the President then use all the power of the nation to enforce, an agreement that all the inhabitants of California shall be transported to Formosa, a selected number to be devoured by cannibals, the rest to labor as Japanese slaves, and in their place the state of California be populated by Japanese citizens with autocratic powers? Plainly there must be some limitation upon this power. What, then, is the rule by which in close and doubtful cases that power is to be measured?

First, let us observe a practical limitation standing in the way of enforcement. Treaties under the Constitution are not paramount to acts of Congress. They are of equal rank. Therefore, a subsequent act of Congress may repeal a treaty. When that is done the treaty is at an end. It ceases to be the supreme law of the land or any law at all. No person can claim any rights under it in any of our courts. The aggrieved nation may have a remedy, but it is not judicial; it is to be sought in such way as it may deem its national honor and welfare require. Such congressional repudiation, however, constitutes a breach of faith of the government, and its exercise is nothing less than national humiliation.

But we find one positive and distinct limitation upon the power itself, to wit, the other terms and provisions of the Constitution which create this treaty-making power. Any treaty, like any act of Congress, which violates a constitutional provision, is void as *ultra vires*. The guaranties of the Constitution are paramount to the power of the President to contract, as they are paramount to the power of Congress to enact. It therefore is plain that no treaty can deprive *any citizen* of any right secured to him by the Constitution.

It also follows, further, that no treaty can interfere with any right which the

Constitution secures *to any state*. This includes of course, its right to integrity as a state.

These limitations of the treaty-making power as here outlined find statement in the case of Geofroy v. Riggs, 133 U. S. 258, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295, where the rights of a French citizen to inherit lands contrary to the statute of Maryland was upheld. The court there said:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised, or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries, the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer, and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. (Citing case.) But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. (Citing cases.)

This brings us to the question sometimes suggested: Does the subject-matter of the treaty-making power extend to the reserved police power of the states? This question has been discussed pro and con in textbooks and magazine articles. When, however, the logic of decided cases is applied to the situation, it seems no longer an open question.

The people did not grant to the Federal government, but reserved to the states, the right to exercise police power. The Federal government, therefore, has no police power except such as may be incidental to its granted powers. However, within the scope of the powers granted to the Federal government, the action of the Federal government controls over state action, no matter whether the basis of the state action be the police power or what. An act of the Federal government within the subject-matter of its jurisdiction cannot be "the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding," if any state act, no matter how plainly within its reserve power, can in any way interfere with the Federal act.

We must not be confused by the holdings that certain constitutional guaranties, the 14th Amendment for instance, did not intend to bar the states from exercising their ordinary police-power jurisdiction.

The rule has long been established that when the Federal government acts within its admitted jurisdiction, those acts are valid, even though they interfere with state police power. Some Federal acts have been construed as not intending to disturb the state police power, but that is a question of what was done, not of what power existed. In Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086, in discussing a conflict between the right to regulate interstate commerce and state police power, the Supreme Court said:

> Of course, if the inspection, quarantine, or health laws of a state, passed under its reserved power to provide for the health, comfort, and safety of its people, come into conflict with an act of Congress, passed under its power to regulate interstate and foreign commerce, such local regulations, to the extent of the conflict, must give way in order that the supreme law of the land—an act of Congress passed in pursuance of the Constitution—may have unobstructed operation. The possibility of conflict between state and national enactments, each to be referred to the undoubted powers of the state and the nation, respectively, was not overlooked in Gibbons v. Ogden, 9 Wheat. 1, 26 L. ed. 23, and Chief Justice Marshall said: "The framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same

supremacy on laws and treaties is to such acts of the state legislatures as do not transcend these powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Again in Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 270, 23 L. ed. 543, 548, in holding void a New York Harbor regulation, the court said:

But assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the states. This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

Again in Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 471, 24 L. ed. 527, 530, in holding void a Missouri statute prohibiting transportation, except under certain conditions, of cattle through the state, the court, while assuming that a general regulation applying to diseased cattle might be valid because such cattle might not be proper subjects of interstate commerce, says:

But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. It was said in Henderson v. New York, supra, to "be clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the states." Substantially the same thing was said by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23. Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution.

Whoever should claim greater rights of the states than did John C. Calhoun would be either excessively brash or excessively ignorant. It is pertinent, therefore, to inquire what Mr. Calhoun had to say. Early in his public career in 1816, in discussing the terms of our treaty with Great Britain, he said:

The limits of the former (legislative power) are exactly marked; it was necessary to prevent collision with similar coexisting state powers. This country is divided into many distinct sovereignties. Exact enumeration here is necessary to prevent the most dangerous consequences. The enumeration of legislative powers in the Constitution has relation then, not to the treaty power, but to the powers of the state. In our relation to the rest of the world the case is reversed. Here the states disappear. Divided within, we present the exterior of undivided sovereignty. The wisdom of the Constitution appears conspicuous. Uhen enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious. Whatever, then, concerns our foreign relations; whatever requires the consent of another nation,—belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its true limits, such regulations are not inconsistent with the Constitution." Cong. Rec. 1st Sess. 14th Cong. 531.

Then late in his life, 1844, as Secretary of State, in discussing a proposed treaty with the German states, he said:

The treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers. 6 Moore, International Law Dig. 164.

It is true the United States Supreme Court has not as yet specifically decided a case in which the plain unambiguous words of a treaty upon the subject-matter admittedly within the treaty-making

power came into conflict with the plain unambiguous words of a state statute admittedly within state police-power scope. But what of it? The rule in the interstate commerce cases that a Federal act concerning that subject-matter controls over police power regulations by the states is conclusive here. In those decisions the court at times, as is noticed, refers to the treaty-making power as a similar paramount power.

The power to tax, however, is surely as essential a part of sovereignty as is the exercise of the police power, yet when a treaty right interferes with the right of the state to tax, the treaty controls. This was decided in the case of the Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667, and the New York Indians (Fellow v. Denniston) 5 Wall. 761, 18 L. ed. 708. A treaty with the Indians assured them the right to hold their lands in severalty, free from taxation or enforced sale. This treaty right was held paramount to the power of the state to subject those lands held in severalty to taxation. True, those lands, because of such treaty regulation, had not passed out of the domain of the Federal government, but the basis of the decision was the treaty rights as paramount to the right of state taxation.

Then, in Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076, the court held that the treaty with the Bannock Indians, giving them hunting privileges within the state of Wyoming, did not prevent that state from passing such game laws as, except for the treaty, it would have power to pass. The decision, however, turns on whether or not the treaty was still in existence. It was assumed by all the court that, if it was still existing, the game laws must yield. It was held by a divided court that the act admitting Wyoming as a state repealed the treaty.

It is established by a long line of decisions that treaties regulating the descent of property, its escheat to the state, etc., controlled over conflicting state statutes. This was because such regulations are matters usually included within treaties between nations. No case involving the right of residents and carrying on of business secured by treaty has reached the Supreme Court of the United States. It is perfectly plain, however, that this right of residence, travel, and labor is just as much within the subject-matter of treaty between nations, as is the right of descent of property. In fact a numerical count might disclose that rights of persons within alien territory, as often as rights of property, have been made the subject-matter of treaties.

The question did, however, arise in California and Oregon, as suggested in my opening, and to those cases I now refer.

In Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777, Judge Deady held void an Oregon statute which prohibited the employment of Chinese laborers on any street or public works in the state. There then existed a treaty with China, providing that the citizens of each country resident in the other

> shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may be then enjoyed by the citizens or subjects of the most favored nation.

It was held that this, of necessity, gave the citizens of China, resident in Oregon, the same right "to live and labor for a living" that our own citizens had. Judge Deady, among other things, said:

> Whether it is best that the Chinese or other peoples should be allowed to come to this country without limit and engage in its industrial pursuits without restraint is a serious question, but one which belongs solely to the national government. Upon it there has always been a difference of opinion, and probably will be for years to come.
>
> But so far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether.

In Re Tiburcio Parrot, 6 Sawy. 349, 1 Fed. 481, Judge Sawyer held void, because in conflict with the same treaty above mentioned, the provision of the California Constitution prohibiting any corporation formed under California law from employing any Chinese or Mongolian. After disposing of the claim that since California was there granting corporate power it might grant it on any

conditions it pleased, it is held that this Constitution also violated the 14th Amendment, which insured to every person within our jurisdiction the equal protection of the laws. Upon the point that it is also void as conflicting with the treaty, after quoting the Constitution and Chief Justice Marshall's opinion in Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23, he discusses the numerous decisions in which state laws as to descent, title of property, and the like have been held void when in conflict with the treaty. He then says:

> As to the point whether the provision in question is within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the Constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid,—and so the authorities already cited hold,—then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power.

Judge Sawyer then proceeds further to remind the citizens of California that under this same treaty the United States in 1870 joined with other nations in exacting from the Chinese government compensation for the injuries to foreigners by the Tientsin riot. He then says:

> It ought to be understood by the people of California, if it is not now, that the same measure of justice and satisfaction which our government demands and receives from the Chinese emperor for injuries to our citizens, resulting from infractions of the treaty, must be meted out to the Chinese residents of California who sustain injuries resulting from infractions of the same treaty by our own citizens, or by other foreign subjects residing within our jurisdiction, and enjoying the protection of similar treaties and of our laws. And it should not be forgotten that, in case of destruction of, or damage to, Chinese property by riotous or other unlawful proceedings, the city of San Francisco, like the more populous city of Tientsin, may be called upon to make good the loss.

It is thus apparent that no comfort can be found in decided cases for the claim that the Federal government has not power by treaty to interfere with the police power of the states. Neither can any comfort be found for such claim in the logic of the situation.

The subject-matter of the treaty-making power is unlimited in the Constitution, and hence extends to all matters which may reasonably be the subject of agreement between nations. This subject-matter must, of necessity, include the subject-matter of police regulation. Quarantine regulations, the terms and conditions upon which persons and goods may be received at the ports of, or remain in the territory of, a country, are very decidedly within the subject-matter of treaty-making power, and also within the subject-matter of police regulation. Being a proper subject-matter of both powers, there can be no escape from the conclusion that the Federal Constitution makes such treaties "the supreme law of the land, anything [which is all inclusive; police power as well] in the Constitution or laws [police regulations are laws] of any state to the contrary notwithstanding."

In each state the police power relates only to the welfare of the citizens of that state. The treaty-making power is to conserve the welfare of each and all the citizens of the entire country. The duty rests with the treaty-making power to properly consider the welfare of all citizens in all treaties which it makes or declines to make. The welfare of citizens of a particular state may well require conservation by treaty concerning a subject-matter within the scope of police regulation. The state, however, is prohibited from making any such treaty, and that power is lodged elsewhere. The reason is that as to foreign countries there are no states, there is only one na-

tion. Otherwise we could hardly be a nation. The basic principle has never been better stated than by George Washington in his letter as president of the Constitutional Convention, commending the result of their labors to the states, in which he said that it was "giving up a share of liberty to preserve the rest." Efforts of a state to disregard solemnly made treaties concerning matters ordinarily covered by treaties between sovereigns may initiate movements, the end of which no man can foresee. Let no state assume to reclaim any share of the liberty it surrendered when joining this Union, lest it hazard all the liberty it has left.

This naturally suggests another question,—Does a national exigency permit greater power to make treaties to preserve the national existence, than exists in time of peace?

We hear much of the claim that the President may preserve national existence by exercising greater powers than the Constitution in terms confers. In a recent number of Law Notes the statements for and against such power are well contrasted by two quotations as follows:

For, by James Madison (No. 41 Federalist, p. 191):

> With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a Federal Constitution could chain the ambition or set bounds for the exertions of all other nations, then, indeed, might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety. . . . The means of security can only be regulated by the means and danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulses of self-preservation.

On the other hand Jeremiah S. Black argued before the Supreme Court (Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281):

> You have heard much, and you will hear more, concerning the natural and inherent right of the government to defend itself without regard to law. This is fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defense of his authority against the opposition of his own subjects or others; and that is what makes him a despot. But in a limited monarch the prince must confine himself to a legal defense of his government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be dragged to the block or driven into exile.

The editor follows with this comment:

> The contrast between the two points of view is clear and characteristic. One is the view of the statesman and publicist; the other that of the pure lawyer.

Permit me to dissent from the editor's view. I do not think Mr. Madison's position is the view only of a statesman or publicist, but not of a lawyer; neither do I think Mr. Black's view a proper legal view.

When the Constitution made the President the Commander in Chief of the Army and Navy, without in any way limiting that power (except the little detail as to quartering troops), that of necessity granted to him in war time all the power a commander in chief in war time exercises under martial law. The acts of President Lincoln, sometimes claimed to have been extra constitutional, were therefore within the limits of the power granted to him. Had he failed to exercise those powers, when necessary, to preserve the Union, it would have been a Buchanan-like abdication and shirking of necessary duty to the nation which elected him.

I think it is time to put a stop to this assumption that our public officials can only preserve national existence by violating our charter. That view is an unjust criticism upon the efficiency of the Constitution, and an unwarranted aspersion upon the character of the saviour of our country. Our organization of government is not so deficient that we have no means to preserve democracy other than by usurping autocratic power.

Does a similar grant of power to preserve the integrity of the nation by making necessary treaties exist? If overwhelming force compels a treaty ceding certain territory as the necessary means of preserving the rest, is our government impotent to do the necessary though humiliating act? True, force may compel such compact. But is it then a compact *ultra vires,* instead of *intra vires?* I suggest, but do not now discuss, the question.

Civil and Criminal Accountability of Members of the Army and Navy

BY HUBERT J. TURNEY, A.M., Ph.D., LL.B.

Judge Advocate General of Ohio; Chairman Military Law Committee, the National Guard Officers' Association; Author "The Uniform Military Code."

THE article appearing in the June number of CASE AND COMMENT and entitled "The Effect of War on Constitutional Liberty" was no doubt written and published without thought that its publication would have the slightest detrimental effect to the united effort of a nation engaged in a world war. Having the exceeding pleasure of an acquaintance with the author thereof, and being fully cognizant of the high and patriotic aims of the publishers, that fact is recognized as undebatable. With respect to certain propositions therein, exceptions must, however, be saved.

The preamble of the article tends to place members of the military establishment in the position of claiming a right to shoot harmless individuals; and a careful reading of the article would vividly bring home, to one contemplating identifying himself with the military establishment, the question of whether he might be called upon to do something which he should not do, and of his civil and criminal responsibility therefor before the law. It is beyond human reason that when large numbers of soldiers armed with high-powered rifles are set in time of war to guard bridges, munition factories, and other facilities of manufacture and transportation, when some of the works so guarded are being destroyed, and while some of the members of the military establishment so being called to perform such duty are young troops who have not had full advantage of military training and discipline, that some unfortunate accidents might not occur. The conclusion, however, should not be drawn therefrom, that there is any claim now or ever made that a member of the military establishment may knowingly kill or injure an innocent person. Even though a soldier knows a person to intend and to be attempting arson, destruction, or murder, his orders are to use no more force than is necessary to prevent the crime and to apprehend the offender.

In time of war the bar can discharge no more usful function than to lend of its knowledge of the law to disseminate in the minds of men being called into service the exact measure of protection which the law affords in the discharge of their duties. Men contemplating enlistment or the acceptance of commissions should be assured that the law adequately protects them in the proper discharge of lawful orders.

The general law upon this subject is set forth in 1 Addison on Torts, page 53, and reads as follows:

> A naval or military officer is not responsible for acts done by him in obedience to the commands of his superior officer, or of the government he serves, unless the commands are manifestly illegal. The justification of an officer sued for acts of force and violence may be made to rest upon a subsequent ratification of his acts by his government, as well as upon a precedent authority.

This is the proposition of law most generally agreed to by textbook writers upon the subject, and the one most generally adopted by the courts. A respectable minority hold to what we believe to be a true doctrine of the absolute nonliability of an officer or soldier of the military establishment where he acts without oppression and without personal malice. We have no doubt that this will be the doctrine finally established and adhered to by the courts. There is nothing

in principle to justify holding that an officer or soldier who undertakes to discharge and does discharge a difficult and dangerous duty should be subjected to the injustice or the expense of defending himself in either the civil or criminal courts for his acts done without malice.

However, admitting for the purpose of argument the stricter rule against the officer or soldier, it becomes necessary to consider the definition of "manifestly unlawful." The definition of "manifest" in 26 Cyc. 515, is as follows:

> Obvious, apparent, plain; needing no evidence to make it more clear; that which is open, palpable, uncontrovertible.

We believe the best law dictionary published to be Bouvier's, who thus defines "manifest" in vol. 2, page 148:

> That which is clear and requires no proof; that which is notorious.

Anderson's Law Dictionary, page 653, defines "manifest" as follows:

> Apparent by examination, without need of evidence to make it more clear; open, palpable, incontrovertible.

Black's Law Dictionary defines "manifest" as follows:

> That which is clear and requires no proof; that which is notorious.

It will be seen that Black's Law Dictionary has accepted verbatim the definition given by Bouvier.

From a decision of a court holding to the extreme doctrine against the soldier, and with which doctrine we can find little logic or sympathy, we nevertheless quote the following:

> A soldier runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances. And if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong, with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. 2 Hare, Am. Const. Law, chap. 41, p. 920; Dicey, Conflt. Law, p. 285; Com. ex rel. Wadsworth v. Shortall, 206 Pa. 165, 98 Am. St. Rep. 759, 55 Atl. 952, 65 L.R.A. 193; Luther v. Borden, 7 How. 45, 12 L. ed. 600; Mitchell v. Harmony, 13 How. 115, 14 L. ed. 75; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; McCall v. McDowell, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673; United States v. Clark, 31 Fed. 710; Riggs v. State, 3 Coldw. 85, 91 Am. Dec. 272; Christian County Ct. v. Rankin, 2 Duv. 502, 87 Am. Dec. 505.

Some of the authorities, while upon their face holding to the doctrine above referred to that an officer or soldier is not liable for the carrying out of orders except where same are "manifestly illegal," yet so word their opinion that they lean toward the true doctrine of the absolute nonliability of the members of the military establishment under such circumstances. For example, we refer to the case of McCall v. McDowell, 1 Abb. (U. S.) 218, Fed. Cas. No. 8,673, where it is held as follows:

> Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the order of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience thereto. . . The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions.

The question of the civil responsibility of a naval officer was considered by the Supreme Court in Wilkes v. Dinsman, 7 How. 89, 12 L. ed. 618, which was an action of trespass against Commodore Wilkes for causing the plaintiff to be imprisoned for disobedience of orders, near the Sandwich Islands. In discussing the responsibility of the commanding officer of a vessel of war, Mr. Justice Woodbury observed:

> In respect to those compulsory duties, whether in re-enlisting or detaining on board, or in punishing or imprisoning on shore, while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. . . . The officer, being intrusted with a discretion for public purposes, is not to be punished for the

exercise of it, unless it is first proved against him, either that he exercised the power confined to him in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression, or, in the words of Lord Mansfield, that he exercised it as if "the heart is wrong." In short, it is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error.

The cases before referred to are cited with approval in the case of United States v. Clark, 31 Fed. 710, in which paragraph two of the syllabus reads as follows:

If a homicide be committed by a military guard without malice, and in performance of his supposed duty as a soldier, such homicide is excusable, unless it was manifestly beyond the scope of his authority, or was such that a man of ordinary sense and understanding would know that it was illegal.

This case has been regarded as a leading authority upon the question of the criminal liability of a member of the military establishment in the carrying out of regulations and orders; and an extensive quotation from same has been copied verbatim into the United States Manual of Guard Duty, for the information and direction of the members thereof with respect to these most important duties. Bargar upon the law of Riot Duty, page 254, makes the following statement of the law:

Orders being relied upon, under the foregoing rule the only liability which the officer may incur is in the execution of these orders. In such execution he is safe if he acts with intent to obey the order, and not from recklessness, or a love of power, or to gratify any bad passion. Therefore, as a general rule, if an officer acts solely with intent to obey his orders he is not responsible for the consequences.

In the case of Ela v. Smith, 5 Gray, 121, 66 Am. Dec. 356, the situation arose under the following state of facts:

Just prior to the Civil War, and when the public feeling upon the question of slavery was at a fever heat, a fugitive slave was captured in the city of Boston, and was sought to be returned to the state of Virginia. A riot being probable, the military establishment of the state of Massachusetts was called upon to parade upon Boston Common and preserve peace and order. The call was issued by the mayor and the circumstances were possibly as adverse to the duty performed as could well be imagined. A civil suit having resulted from this tour of duty, the supreme court of Massachusetts, in a decision rendered under these trying circumstances, in paragraph three of the syllabus has this to say:

Precept of civil officer calling out militia affords complete justification to all those bound to obey its command for acts done by them in pursuance thereof, when issued within the limits of the authority conferred by law, and in exact conformity to the terms of the statute.

We submit that this is expressive of the true doctrine. Any other holding would require a military commander, when called upon in aid of the civil authorities to preserve the law, to consider the question as to whether a majority of citizens of that particular locality at that particular time and place were in favor of the law being enforced, or not. Unquestionably in that case, a majority of the citizens of the great city of Boston were unalterably against the state of Massachusetts permitting the return of this particular slave to the commonwealth of Virginia. Unquestionably, if a referendum vote had been taken in Boston at that time, the overwhelming sentiment of the citizens would have been in favor of a defiant refusal to obey the then highly unpopular Fugitive Slave Law. Most of the lawyers and judges of that commonwealth at that time were of the opinion that the Fugitive Slave Law was not only vicious, but unconstitutional.

Now, let us consider the position of the commander of troops in Boston under these circumstances and at that time. He had taken an oath as follows:

To bear true faith and allegiance to the government of the United States of America and the commonwealth of Massachusetts; to serve them honestly and faithfully against all of their enemies whomsoever; to obey the orders of the commander in chief, and the officers appointed over him.

He had been taught that the military establishment should be held strictly subordinate to the civil power. The statutes of Massachusetts then provided, as the statutes of many states now provide, that the mayor of the city might call upon

the troops to suppress disorder or assist the civil authorities. He had received an order from those civil authorities which he was bound to obey. The civil authorities were about to deport a slave from the free state of Massachusetts to the slave state of Virginia. Their determination so to do he had been called upon to enforce. Are we then to say that it is the law that that officer under those circumstances was called upon to determine in his own mind the question of the constitutionality and the legality of the Fugitive Slave Law,—upon which question the most august and dignified tribunal of the world, and the court of last resort, were finally of a divided mind, —and in the event he made an error in his decision, to be civilly liable in damages and liable to criminal prosecution?

When troops are called into the military service in time of war, by enlistment or by draft, they should clearly understand that obedience is their first duty. The first word is discipline, and there is no second. The tendency to debate the legality of orders in the Russian army may yet result in the downfall of a nation just emerging into freedom. Instil into the mind of a recruit a doubt with respect to his duty to obey his officers, and a long step has been taken toward destroying the morale of the organization.

Fixing the Fee

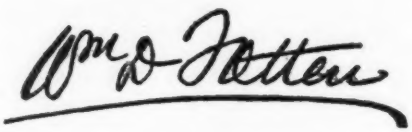
Glad hour of reflection
That contemplates collection
Of long expectant fees,
For after toil and striving
The essence of our thriving
Is typified in these.

With disposition gracious
It often seems vexatious
Our labors to recount,
And while for justice preaching
To keep from overreaching
In fixing the amount.

Too often roars the client,
In tiger mood defiant
To anger giving vent,
Forgetting how you've served him,
In time of trouble nerved him,
When he had not a cent.

And, figuratively speaking,
When fair rewards you're seeking
Thrust in your sharpened blade
And reap your golden treasure
In nonjudicial measure,
Relentless, unafraid.

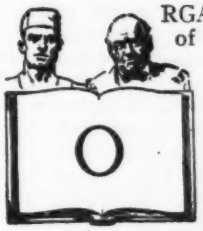
Cheer up, my brother warriors,
Who grace the ranks of lawyers,
Stand firmly for your fees!
For after toil and striving
The essence of your thriving
Is typified in these.



The Regulation of Labor*

BY WALTER GORDON MERRITT

Of the New York Bar



ORGANIZED labor is one of the most necessary and beneficial institutions known to democracy, commanding my entire sympathy for its legitimate work, and I hope you will not forget this during my remarks, as my purpose to-day is to concentrate attention on some of its mistaken aims. To uncover faults is not an unfriendly act. My professional activities in labor litigation throughout the country have thoroughly satisfied me that certain of the avowed objects of organized labor, upon which it is openly and aggressively centering its activities, are opposed to the best interests of our commonwealth. In saying this, I pass over such excesses as violence, intimidation, dynamite, and other kindred crimes, for which most unions disclaim responsibility and profess disapproval. I dismiss all question as to what active duty, if any, organized labor owes society to repress such lawlessness in industrial disputes of its own engineering, and, probing to the very heart of union philosophy, examine some of its objectionable aims. These orthodox purposes and ambitions of organized labor of the United States constitute one of the most critical issues in this country; and it is to you, as members of our great profession as well as a part of that greater body, the American public, that the issue must be submitted for final arbitrament.

One of the most notable tendencies of our generation has been the requirement of less ruthless methods in business rivalry, and profound changes have been made in our laws to that end. Owing to the enactment of stringent Federal statutes, a man can to-day embark in business with far more security from the unjust attacks of his rivals than ever before. The Interstate Commerce Commission assures him that his goods will be carried for a fair freight or express charge as compared with those of other shippers; the Federal Reserve Board prevents a ring of financiers from interfering with his banking; the Federal Anti-trust Laws forbid any act of coercion or oppression or any artificial arrangement to exclude him from the market; while the Federal Trade Commission, including all that the Anti-trust Law includes, crowns the whole moral and legal code by declaring that nothing unfair shall be done against him in the form of competition. These laws are in recognition of the indisputable fact that organized capital, with its great economic power, is capable of great abuses; and that both the interests of society, as well as the rights of the individual, require that it be restricted. Now just as society was compelled to intervene in the struggles between employers in order to insure fair play and the protection of its own interests, so must it interfere in the struggle between employers and employees which is no longer a private conflict. We cannot abolish the labor question, but we can regulate it. In opposing such an obvious necessity, and demanding exemption from all laws which restrict the oppressive use of economic power, organized labor has adopted a platform and assumed a position which militates against right and justice and the best interests of society. That is the burden of my talk.

There should be no more hesitation in resisting and rejecting the unjust demands of labor, than there has been shown in rejecting the unjust demands of capital; there should be no more hesi-

* From address entitled "Are the Present Aims and Methods of Organized Labor Contrary to Public Policy—More Particularly from a Legal Standpoint," delivered before the Wisconsin State Bar Association in June, 1917.

tation in extending government regulation and supervision to labor where the interests of society demand such extension, than there has been in extending such regulation and supervision to capital. Regulated capital and unregulated labor is, on its face, a contradiction. Capital and labor are both powerful special interests which, when extensively organized, have the tendency and capacity to unduly dominate our affairs and jeopardize our doctrines of equal rights and personal liberty. Through vigorous action the state has disciplined and regulated capital, and through corresponding action, the supervision and regulation of organized labor must follow. These are most obvious truths, but at the behest of organized labor the state is actually pulling in the opposite direction. . . .

The threatened railroad strike of last summer is another example of the overreaching of this powerful class, and its disregard of the rights and interests of others. Such a strike as was contemplated is literally a death-dealing blow, yet the railroad unions, supported by the American Federation of Labor, declined arbitration and declared for a general suspension, and even now they defy society to pass any law restricting their rights in this regard. They say that in all society it is not possible "to get neutral arbitrators," and that they prefer "to trust their claims to the results of economic action." Such is their political and economic power that a panic-stricken Congress rewarded their wrongdoing and punished the railroads, which only demanded a fair trial and the protection of society through arbitration. But the Brotherhoods remained shameless. Even after the crisis had passed and an indignant public had expressed its disapproval, one of the brotherhood chiefs disturbed by the litigation which suspended the operation of the Adamson Law declared before a committee of Congress, "I wish to God that I never had recalled the strike order." Another labor leader, speaking for the Federation upon proposed legislation restricting strikes on public utilities, declared that "law or no law, President or no President, such a law would not be obeyed." And so in this matter organized labor declared its program of open defiance of law and its utter disregard of the interests of society. Under conditions such as these, is it strange that President Wilson should have felt the necessity of saying: "The business of government is to see that no other organization is as strong as itself; to see that no body or group of men, no matter what their private interest is, may come into competition with the authority of society."

In opposing regulation, it seems to me that organized labor is opposing the best interests of society. In the case of the railroads and other public utilities long known as quasi public corporations, rates and service are in many instances defined and regulated by law or governmental agencies, and I think it may be safely stated that such regulation has met with united public approval and has now been relegated to the shelf of those questions which are beyond discussion. Should we not, therefore, with the same finality extend the same regulation to labor? In all cases where public service corporations are regulated by governmental supervision, should not strikes be forbidden and wages and conditions of employment, in the event of disagreement, be determined by the same Commission that regulates rates? Rates and wages are interdependent, and a regulated rate with an unregulated wage is an absurdity. Rates cannot equitably be adjusted for society unless wages are also controlled. The public, which requires that railway companies and their officers give continuous service, should not allow the service to be interrupted by the servants of these companies. The need of public protection and the dangers of interrupted service are greater in the case of the servants than of the master. All these considerations and the paramount importance of public interests were recently recognized by the Supreme Court in its decision on the Adamson Law, so that the power to so regulate conditions of employment on railroads has now been judicially sanctioned. There is no longer a constitutional obstacle, but there still remains the obstacle of union opposition. If the position of the Federation of Labor is accepted, there can be no regulation restricting the right to strike on pub-

lic utilities, and even such a mild measure as the Canadian Industrial Disputes Act, requiring investigation before declaring strikes or lockouts, will be denied the public. The ultimatum of "hands off" which the union has issued to society cannot be allowed to prevail if public interests are to be protected. . . .

The country is entitled to the services and fruits of the services of all in time of peace or war, and any attempt to deprive it of these benefits is an injury to the state and an obstruction to national efficiency. When the nation needs munitions, it cannot accept the disbarment of nonunion labor; when it needs shoes, it cannot stop to require the union label; and so in war we find emphasized what should be one of the most fundamental principles of the state. Now that the state and national governments are embarking on a career of industrial regulation, the need and excuse for closed shop coercion diminishes, for the state can hardly permit that those who comply with its statutory standards of fair play and decency should be driven from the industry for not maintaining some other standard.

It is the lesson of responsibility which must be taught. The unionists, acting on the theory that the government is unjust or dishonest, are inclined to treat it as a foe which cannot be trusted with the interests of the workers. There is little manifestation of authority from the courts to the Militia, from the police to the constabulary,—there is no form of civil responsibility, from criminal prosecution to injunction and damage suits, against which they do not rebel. That is the conflict between the workers and society, and it frequently overtops the private conflict with employers. This feeling and opposition must be overcome, and the unionists must be taught responsibility before the law and the fact that private rights end where public wrongs begin. Labor unions are a necessity to democracy, but there may be good unions and bad unions, just as there were good trusts and bad trusts, and we must conduct the crusade against the bad union. Observance of law and the rights of others must be the price of the privilege of existence of any labor union in any community. Recognition of industrial freedom must be the price of their freedom. . . .

As long as any labor union persists in a policy of hostility and irresponsibility toward society in general and employers in particular, just so long and no longer are employers and business men justified in shunning and fighting that union. Who will contract with the irresponsible? Who will enter into relations of intimacy and dependence with those who can and will injure him with impunity? Irresponsible unionism is the mother of antiunionism.

Those who uphold the present *régime* or seek further immunity for organized labor, are the enemies of labor. It is a poor policy for the state to stand on the side lines and hold the time watch while the combatants roll up their sleeves and employ all the distressing and familiar methods known to industrial warfare. You cannot settle the labor question as the Federation demands, and as Congress has at times dangerously inclined, by withdrawing the state and courts from the arena of industrial strife and bidding the combatants fight it out. Denying or abolishing injunctions and damage suits, and sanctioning strikes and boycotts for corrupt and oppressive purposes, may seem desirable to selfish and shortsighted unionists, but it is placing the power of commercial life and death in private hands, to be exercised without legal restraint, which is the very essence of tyranny. Legislation to this end is legislation for class war, and not industrial peace. It is as likely to spell the end of organized labor as it is the destruction of capital. It is likely to destroy those principles of civil and industrial liberty which are more essential to the humble worker than to the employer.

We are still pulling in the wrong direction. For over a decade this question has been in the forefront, and yet we have had no legislation worthy of the name looking toward the responsibility of organized labor; no legislation which would make organized labor a law-abiding institution to co-operate with employers and society.

The Country Law Shop and Its Occupant

BY JOHN A. EHRHARDT

Of the Stanton (Neb.) Bar

[Ed. Note.]—We are glad to reprint, at the request of some of our readers, Mr. Ehrhardt's unrivaled description of the old time country law office and of the dreams of its occupant. It was delivered some time ago at the Annual Banquet of the Nebraska State Bar Association and has survived the test of the years.

HAVING been an occupant of a country law shop in this state for almost a third of a century, my thoughts at this time revert to the shop as I knew it thirty odd years ago, rather than the modern law office, found in many of our country towns and villages.

The country law shop then was a small, dingy, smoky, dust-begrimmed room. An old desk, rather dilapidated; rickety chairs, one with arms considerably whittled; a homemade cuspidor as large as the base of a stove; a spool case for blanks; an old-fashioned ink bottle (we did not call them ink wells in those days), filled periodically at the county clerk's office; a pen or two, borrowed from the county; some legal-cap paper, also borrowed; several pencils, probably stolen; an old stove with three legs and a brick to stand on; a few rough boards for shelves; and a rather large stock of self-conceit; an old brier pipe and a good supply of homegrown tobacco, probably received from a client in payment of a fee. A copy of the general statutes, not the statutes of '66, but the crime of '73; session laws of one or two sessions of the legislature; Seney's Code; Swan's Treatise (borrowed); Patent Office Reports and agricultural year book, owned by the occupant; Congressional Records of the second session of some Congress, also owned; the complete works of Lorenzo Dow and Baxter's Saint's Rest, constituted the library of the occupant of the country law shop. Clients very few, or none; certificate of admission to the bar, well-framed and hung in a conspicuous place in the office. This was the paraphernalia.

With these surroundings and under these conditions the occupant of the country law shop became a dreamer; he dreams of the day when his reputation as a trial lawyer will pass beyond the lines marking the boundaries of his own county and he will be called to other cities and districts to try important cases; and wakes up to find that foreign attorneys try all the important cases in his local court.

He dreams of the day when he will stand before the juries in the court of his district and win all the important cases by matchless eloquence and profound knowledge of law, and wakes up to find that the jury usually returns a verdict for the other fellow.

He dreams of the day when he shall stand in the great Federal building before a Federal jury in the presence of a Federal judge to defend some important personage for the technical violation of a statute in trespassing upon the great public domain, and wakes up when he is called before a justice of the peace to defend some poor litigant for the trespass of his cow over his neighbor's cabbage patch.

He dreams of the day when he shall stand before the supreme court of his state and astonish the court with his wonderful learning and intimate knowledge of the procedure and practice,—and wakes up to find that his appeal has been

dismissed by the court on its motion for want of jurisdiction, as the case should have been brought there on error instead of by appeal.

O, he is a dreamer; he dreams of the day when he shall stand before the highest court of the land to contend for some profound constitutional question,—and wakes up to go before the police judge to argue the legality of some dog ordinance passed by the town board with little or no consideration.

He dreams of the day when he shall be attorney general of his state, or perhaps of the nation, and have general supervision of the prosecution of malefactors of great wealth and undesirable citizens,—and wakes up to find that he has been defeated for county attorney of his county or failed to be appointed attorney for the city or village, and cannot even prosecute the violation of the 8 o'clock closing law.

He dreams that the head of the nation, the great President of the United States, has heard of his learning and fame as a jurist and has called him to accept one of the highest judicial positions in the country,—and wakes up to find that he has been defeated for county judge, or that the voters of his precinct have elected his opponent justice of the peace.

O, he is a dreamer; he dreams of the day when his library will be complete and all of his law books paid for,—and wakes up to find that he is under two or three contracts to pay for two or three editions of encyclopedias or some system of reports and can only look forward to "four more years" of abject slavery to the law-book publishing company.

He dreams of the day when he will be employed by a great transportation company in their legal department and see his salary looming up like a mountain as far in the distance as the electric headlight of an engine throws its rays,—and wakes up to find that the law has taken away his pass, and if he wants to ride on the cars to attend a meeting of this association he must pay his fare.

He dreams of the day when the mighty financial institutions of the state will call upon him for advice and counsel as to how to conduct the affairs of their corporations in the management and expenditure of millions of dollars,—and wakes up when he receives a notice from his local banker that his note for $25 is past due, cannot be renewed, and must be paid.

He dreams of the day when he can retire from actual work and only employ his time in attending board meetings of some great corporation in which he owns the majority of the stock, and count his bonds and stocks and clip his coupons and draw his dividends,—and wakes up to find that his grocery bill is unpaid, his coal bin empty, and that in the future as in the past his life will be "one demnition horrid grind."

But his dreams pass away, for there comes an awakening, and he wakes up to remember. He remembers the struggle of the years, the days and weeks and months that he walked the floor and wore the little path in his law shop and racked his brain to determine the "law of the case." He remembers the Sergeant Buzz Fuzz he met in the courts and the Uriah Heeps that snarled at his profession. He remembers the royal good fellows that he met in the profession; yes, he remembers the defeats that he suffered, but he remembers the victories that he has won, the honorable place that he has attained in his profession, the legal history of his state he helped to make, the good that he has done, the life he has led.

The Salic Law

BY FRED H. PETERSON

Of the Seattle Bar

AST October the venerable Francis Joseph, Emperor of Austria, Apostolic King of Hungary, possessor of many other titles and distinctions, passed from this earthly sphere. He succeeded to the throne December 2, 1848, coming within two months of completing a reign of sixty-eight years as ruler of the dual monarchy. There have been other sovereigns who nominally reigned for a longer period, but none who approached him in time of actual service.

Louis XIV. of France apparently began his reign at the age of five in 1643, but in fact, his mother, Anne of Austria, became regent; she and Cardinal Mazarin conducted the government until the latter died in 1661. Le Grand Monarque, therefore, actually ruled from 1661 to 1715, or fifty-four years. George III. was King of England from 1760 to 1820, but for the last ten years of his reign George IV. was regent. Victoria became Queen of England in June, 1837, and died in January, 1901, thus completing an actual service as ruling monarch of more than sixty-three years. Next to her among British sovereigns comes Henry III. with fifty-seven years, while Queen Elizabeth has forty-five years to her credit.

In surveying history we are unable to cite another instance where a monarch came to his throne at the age of eighteen years, immediately assumed the reins of government, who continually, and apparently without dimming of his faculties, ruled a great conglomerate nation for nearly sixty-eight years. We have read of the harsh decrees of the late Emperor when revolution threatened him on all sides in 1848, the year of his accession, but repressive measures may have been necessary; for it should be remembered that his uncle, Ferdinand IV., resigned December 2, 1848, because of the lowering political storm. The business of ruling over turbulent mixed races like those that compose the Austro-Hungarian Empire is not a sinecure.

It is related that Count Andrassy, a leader of the Hungarian revolution, was sentenced to be hanged in 1849, but escaped to Turkey; later he became premier of the empire, when Francis Joseph remarked, "Once I would like to have hanged you; now I am glad that I did not." Andrassy was a distinguished statesman; he represented his government at the Berlin Congress in 1878, which allowed Austria-Hungary to maintain a suzerainty over Bosnia and Herzegovina that in a measure resulted in the present European conflict.

There is no doubt that in the beginning of his reign there was much hostility towards him; as years passed the people regarded Francis Joseph with veneration, showing him the greatest respect and devoted affection. This was partly due to the many afflictions that befell the house of Hapsburg. In 1855 an assassination was attempted by shooting. As an offer of thanks for the Emperor's escape, the magnificent Votive Church was erected on the Ringstrasse in Vienna. It is now chiefly used for worship by the garrison. In 1867 the Emperor's youngest brother Maximilian was shot in Mexico. The widow of Maximilian, the Empress Carlotta, has for years been an inmate of an insane asylum; she was the daughter of Leopold I., King of the Belgians.

In 1889 Crown Prince Rudolph, the only son of Francis Joseph, died in a hunting lodge at Myerling in Bavaria; whether it was suicide or murder is not known to the public. The Empress Elizabeth was a highly cultivated, very

sympathetic, and most charming woman; she met her fate at Geneva in 1898, when, incognito, about to enter a steamboat, an anarchist drove a file into her heart.

After the death of Rudolph, Archduke Karl Ludwig, brother of the Emperor, was in line of succession, but he refused the honors of a prospective crown, and his eldest son, Francis Ferdinand, who was slain at Sarajevo in 1914, became heir apparent; but as he had married the Countess Choteck morganatically, his children could not succeed him. Upon the aged monarch's decease, his nephew, Charles Francis Joseph, son of Archduke Otto, became Emperor. These introductory remarks lead to a consideration of the peculiar code known by the title,—

Lex Salica or Salic Law.

The daily press has often referred to the Salic Law as a reason why Charles Francis is now the ruler of Austro-Hungary. Naturally, the question has often been asked, "What is the Salic Law?" The late Francis Joseph had a son and three daughters. A daughter survived the son. When Crown Prince Rudolph died it was but natural that the Emperor would like to see his granddaughter or one of his daughters succeed to the throne, but the Salic Law was a bar; it determined that the crown passed to the male heirs exclusively. As long as there were brothers of the Emperor living, or they had male descendants, these would succeed to the imperial titles in preference to the female heirs of the late sovereign, no matter how near.

The books disagree on the origin of the Salic Law; it seems that the Ripuarian Franks, who inhabited the banks of the Rhine, enacted these laws so that allodial estates would descend to the males, to the exclusion of the females,—to the end that the nation might have "the military services of every proprietor." Hallam's Middle Ages, p. 125. Others assert that the Salic Law is a collection of laws by the Salian Franks in the fifth century. Montesquieu, however, derives "Salic" from "sala," a house. "Salic land was the land belonging to the house." Montesquieu, Spirit of Laws, p. 335. Then it has a been asserted that "Salic" is derived from the river Saale; that the people living along its banks were the originators of the "Salic" Law. The Saale flows into the Main near Frankfort.

The fact is, there was and is a Salic Law, no matter what its origin, which has been in force to this day in France, Spain, Austria-Hungary,—the Kingdom of Hanover until it ceased to exist in 1866,—and other European states.

For our purpose we are only concerned with § 6, Title LIX. of the Lex Salica, which has had an influence upon history out of proportion to its seeming importance, thus:

> But of Salic land no portion of the inheritance shall come to a woman; but the whole inheritance of the land shall come to the male sex.

No one would suspect that these unpretentious lines had changed European history,—affected dynasties and princely houses. The Salic Law was first invoked in 1317 by Philip VI. It came about in this way: Philip IV. died leaving three sons, Louis X., Philip V., and Charles IV.; all three reigned for short periods and died leaving no issue. Thereupon Philip VI., son of Charles of Valois, brother of Philip IV., succeeded to the throne. Edward III. of England was a grandson of Philip IV., and as direct heir claimed the French crown through his mother, a daughter of Philip IV. To bar Edward III. of his royal claim Philip VI. convened the States-General, which declared the principle that in France "women should never inherit the crown." This caused Edward III. to wage war against France in 1339. The battles of Crécy and Poitiers were fought, and there was no peace until after the death of the "Hunchback" in 1377. France was bankrupted and rebellion was rampant.

The Salic Law was recognized in Spain by Philip V. in 1712, "by which the most distant male of the family would be called to the inheritance in prefererice to the nearest female." Ferdinand VII. left an infant daughter; desiring that she succeed to the Spanish throne, he suspended the Salic Law in 1830; thus, Don Carlos, the King's brother, as claim-

ant to the throne, was superseded by Isabella Louisa, and this led to the Carlist war.

On the death of William IV. Queen Victoria would have become Queen of Hanover, had not the Salic Law excluded her. The next male heir was her uncle, the Duke of Cumberland, fifth son of George III., who obtained the crown.

The most celebrated instance in history is the accession of Maria Theresa, Empress of Austria. She was the only child of Charles VI., who was Emperor from 1711 to 1740. During his entire reign he devoted himself to assure his succession in Maria Theresa, making many sacrifices and treaties to accomplish that purpose. The Salic Law excluded her from her father's throne, but in 1713 he caused an act to be passed, known as the Pragmatic Sanction, which suspended the Salic Law in so far as she was concerned. Maria Theresa had a clear title to her throne, sanctioned by treaties of all great European powers; yet in 1741, within one year after her accession, Frederick the Great commenced war, disputed her title, and took from her the rich province of Silesia.

The Pragmatic Sanction was no protection against war and strife. Maria Theresa succeeded to the throne in 1740 and died in 1780. Her name is greatly revered in Austria. Since then the Salic Law has been in force, and was fully respected in determining the late Austrian succession.

It is remarkable that this law should have been in effect for fifteen centuries. Although the lines quoted only regulated the descent of landed estates, there is no possible construction which make them applicable to sovereignty; all the other parts of this law have been obsolete for ages.

The Salic Law is unique in that it prescribes a fine for all offenses; but in some cases if the fine was not paid capital punishment followed. There was also a distinction between natives and foreigners. If a Frank plundered a Roman, the fine was 1,700 denars, or 35 shillings; if a Roman robbed a Frank, the penalty was increased to 2,500 denars, or 63 shillings. I am not aware of any other law which permitted such discrimination in favor of citizens against aliens.

Although written in Latin, the Salic Law is the oldest Germanic Code extant. It was administered by popular courts, where all the freemen were judges; the court was much like a town meeting and matters were decided by common vote. Ames, Lectures on Legal History, p. 34.

The death of the Austrian Emperor brought this ancient Code again into prominence. Another Pragmatic Sanction might have set it aside in favor of near female relatives, but Francis Joseph was a great stickler for law and etiquette; his fidelity to law and existing institutions would not permit him to interfere with the established rule of succession; and then the deceased monarch well knew what wars and difficulties beset the talented Maria Theresa, so he may well have hesitated to place his daughter or granddaughter in such a trying position. Francis Joseph lived up to the highest tradition of his race; he had the welfare and the best interest of his people sincerely at heart; toiling to the last day of his more than eighty-six years, he worked incessantly to benefit his subjects.

His people saw in him the personification of justice and authority. It was a common phrase in his realm to say: "Ich gebe nicht nach und wenn ich bis zum Kaiser gehen muss,"—"I will not give up and if I have to go to the Emperor,"—for the protection of my rights.

Fred H. Peterson

The Law of Legal Strategy

BY WILLIAM W. BREWTON

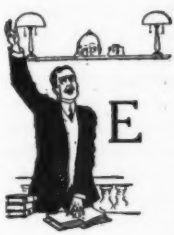
Of the Atlanta Bar

Author of a Series of Philosophic Essays on Law

[Ed. Note.—The author presents his subject from the standpoint of the legal strategist who would take advantage of the bias and weak points of others. As the concluding paragraph discloses, the writer does not approve, but unqualifiedly condemns, the methods of strategy described. This article was written on the Mexican Border where the author saw service as a member of the Machine Gun Company A of the 5th Georgia Infantry, National Guard.]

IT is important that we should, if possible, form something like a general theory of current opinions so that we may neither overestimate nor underestimate their worth. Arriving at correct judgments on disputed questions, much depends on the attitude of mind we preserve while listening to, or taking part in, the controversy; and for the preservation of a right attitude, it is needful that we should learn how true, and yet how untrue, are average human beliefs. On the one hand, we must keep free from that bias in favor of received ideas which expresses itself in such dogmas as 'what everyone says must be true,' or 'the voice of the people is the voice of God.' On the other hand, the fact disclosed by a survey of the past, that majorities have usually been wrong, must not blind us to the complementary fact that majorities have usually not been *entirely* wrong."—Herbert Spencer.

"As long as the connection subsists between his [man's] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."—James Madison.



ERROR arises in human analytical incapability, and progresses in proportion to the extent of the same. Failure on the part of the human mind in the proper exercise of its judging faculties results in the loss of truth and the acceptance of error; while such loss and such acceptance progresses throughout society in direct ratio with the number of minds whose analytical powers are deficient. For so long as everything is not true, and there yet exists throughout human affairs a certain quantity of truth, it must be conceded that in the affairs of the world truth and error are to be found mixed. So that the attainment of truth may be said to be a process of elimination and extraction, the performance of which, obviously, is for the analytical powers.

Hence, the greater the proportion of human minds in society deficient in powers of analysis, the greater the extent of error to be found in the world. It is this conclusion which points us at once to that greatest of all social and political illusions, to wit, that majority establishes right, a political nostrum sharing the same invalidity with that one which asserts that might is right.[1] If one man hold an erroneous opinion, every ten or ten thousand men who agree with him are in the same predicament. For truth is a condition, free, independent, and eternal, determined not at all by human belief in it. But the cause for the very general belief in the efficacy of the opinion held by the greatest number, over the validity of that held by the minority, lies in the belief that the greater the number of men who hold an opinion, the better the chance that the truth has been attained, that error in the opinion would have been found had it existed, while the fewer the number of men holding an opinion, the greater the chances that they do so through their inability to see the error observed by the majority,—in a word, the cause for such belief in the

[1] It is easily seen that one of these illusions holds as good claims to our acceptance as the other. For right, a *moral*, and hence a free and independent conception, is marked by no inherent or arbitrary connection whatsoever with either majority or might; but the latter are brought under and judged by this free and independent faculty, inasmuch as both are equally empirical and worldly conditions.

majority lies in the conclusion that the majority of men possess good and accurate analytical powers.

However, the majority of men do not possess good and trusty analytical faculties. It is to be deduced from history, and it is to be observed from modern times, that it is principally impulse which sways the world. That is to say, it is upon impulse that the actions of most men, in the majority of instances, are based. It is for this reason that morality does not play a greater and the most important part in determining the affairs of the world. And the fact that the majority of men's actions are not morally sound is full and sufficient proof of our contention that most of their actions are based upon impulse. Self-love, conscious or unconscious egotism, cloud and obscure the operation of the free and independent analytical faculties of the minds of men in most of their activities.

Indeed, in the cases of many men, their actions, opinions, and conclusions seem so much to be resultant of impulse, that they appear to be possessed of true discretion hardly at all. And if feeling be the chief factor in most of the determinations of the majority of men, what shall be said of the chances for the attainment of a rational justice, which indeed is the most delicate of all objects to which our analytical powers alone are to be referred? Discretion is the basis of justice, and, if the capability of pure discernment and discretion be considered, it may be safely asserted that few men possess it. Justice is the first and most distinct of all moral objects, distinctively the object of our analytical powers, and not at all to be connected with our impulses. It follows that he who judges through feeling is incapable of conceiving a high order of justice.

Hence, in the practice of the law, justice unmixed with error is not frequently to be attained, because juries and courts with unclouded discernments are rare. The weakness of the human reason, particularly in the cases of men of strong impulse and egotism, is evident within tribunals of justice as well as without. And because not many men are possessed of judgments unbiased and unaffected by some conscious or unconscious impulse, it is to be conceded that, while there are many brilliant lawyers, there are in comparison few discreet judges. As regards juries, of course, the faulty discernment of justice is still more evident, and naturally so. For judges' appreciation of the right of causes before them is being constantly sharpened, while that of jurors is seldom tutored and corrected.

We contemplate here, of course, the question of the discernment of justice which is unbiased by any of the many phases of the ego, and our contentions do not move to the question of the integrity of courts and juries. Corrupt judges and triors are rare in our courts, and their sincerity and honesty is not the object of our discussion. Our province here is the legal foibles of courts and juries, and of how they may be turned to the account of the legal strategist.

Discretion, then, as regards justice, we must assert to be an attainment rarely held in high degree.[2] Hence, judges sitting upon causes to ascertain and measure their right are confronted by problems which, in perplexity, are surpassed by none of those referred to other men. And it is indeed a man of great wisdom and mental strength that is found in the discreet judge. Great ability as an attorney is based on great ability in law and logic; but the standard by which to measure a judge's ability lies in the degree of his appreciation of moral right.

But this appreciation of the right of causes is frequently to be found clouded by conceits, unswerving opinions, unconscious self-love, and many other phases of the ego; and these very often underlie the determinations of causes, not only when the tribunal to decide the particular issue is a judge, but even more so when it is a jury. Hence, in generalization, the following *law of legal strategy* is applicable:

In seeking to win through strategy, the unconscious bias of the judge or jury is to be presented as the justice of the cause championed.

[2] Inasmuch as the perfect discernment of the justice of a cause is an attainment which is conditioned upon the possession of absolute and perfect moral faculties, it is not too much to assert that it can be held by only the Supreme Being Himself.

Legal strategy consists of causing to be seen as justice that which establishes the cause championed. This end is attained only when the bias of the tribunal, as regards the justice of the cause, coincides with that side of the cause contended for by the strategist. So that the attorney's problem is to bring about this coincidence; that is to say, he is to so manipulate and present the side of the cause championed by him that it will agree with the opinion of the tribunal as regards the justice of the cause on trial. The opinions of the tribunal, judge, or jury as the case may be, are to flow to the side contended for by the attorney.

The problem which immediately becomes obvious here is that of how is the attorney to gain by representing the bias of the tribunal as the justice of his cause, if this bias is clearly against him? And it is here that is found the essence of his problem as strategist,—before the bias of the tribunal may flow to his side, the cause he represents must be made to appear in agreement with it; and in no other way is he to expect the necessary coincidence or interrelation to be effected. The burden is directly upon the strategist; his method is to conform the status of his cause to the opinions of the tribunal, and not to attempt a procedure *vice versa*.

The methods to be pursued by the legal strategist in ascertaining the unconscious prejudices of the court or jury regarding the cause on trial vary, of course, with the personality of the court or jury. If the issue is before the court alone for determination, the same methods may not be applicable which are effective in drawing out the bias of the jury. One man, skilled in law and legal logic, is not to be presumed to be approachable by such methods as may be sufficient for a number of men, untrained in law and of smaller caliber as regards logic. For instance, it is far easier to effectively flatter a jury than a judge. And inasmuch as flattery has been in all times the most prominent weapon of the strategist, he is to look very carefully to how it may best be used against a judge. And in so using it, the very height of skill and the shrewdest dissimulation are requisite. Courts are extremely alert to all that comes from the attorney which can possibly be construed as an attempt at flattery. If the judge be a man of strong passions and convictions, which dominate his personality, a dignified and reserved, though clear and complete, yielding to his opinions may be sufficient. But to gradually draw to his side the bias of a judge regarding the justice of a cause, who is a man learned, conservative, and discreet, the attorney has not nearly so easy a task. With the broadly cultured, widely read, and learned lawyer as judge, the attorney is to move with the greatest caution. In the latter case, the attorney's methods will very probably be directly converse to those to be employed in the former case. Indeed, in order to draw out a wise and discreet judge, it will be found necessary almost always to clearly and directly combat and oppose his views. In the majority of instances with such judges, the weapon of flattery is possible of use only after the attorney has wrestled with the judge in legal opinion up to the point where the judge brings to bear his strongest and most comprehensive argument, has asserted his all-inclusive opinion regarding the issue being discussed, when he is to retire before the weight of such profound truth and logic, manifestly and clearly conceding, with dignity and reserve, however, that the validity of the court's opinion has made a deep impression upon his own convictions.

The tool of discreet flattery, of course, is possible of use with studied effect only when the attorney appears before the court, and written briefs laid before appellate tribunals cannot hope to employ such means with anticipated results. For flattery is directed against personality, and not against reason. It is a means possible of surprising results before open court, however, and may be used with good effect not only with judges, but also with juries and opposing counsel.

The art of producing a clash between opposing counsel and the court, also, serves the purpose of the strategist to draw out, for his own inspection and consideration, all that lies against him. In all contests which he is to wage in court, and especially in the cases of

lengthy or extended trials, it is his first desire to have the cards of all who are to oppose him laid upon the table. To bring about such a predicament before the court or counsel against him as will make it necessary for the latter to bring to bear at one point all the resources of that side in order to save itself furnishes the best possible opportunity for the strategist to observe and anticipate all which he will have to contend against.

As regards the problem before the jury, the attorney who must win through strategy, or lose, will find that his chief weapon, especially in such instances where his case has all but fallen, is pure dissimulation itself. Where his case has little or no merit, or where opposing counsel has reduced it to that status, the strategist, at the last stand before the jury, is to overcome the influences which have prevailed against him by *counteracting* them; that is to say, he must make a new case out of the one on trial, and cause the jury to view the whole cause in an entirely different light from any in which the jury hitherto dreamed that the case could stand. The principal issue in the cause must be shifted from the point where it has hitherto seemed to lie, and must be laid upon that part of the strategist's cause which is least vulnerable. The arguments, contentions, adduced law, and all which the opposing counsel has brought to bear before the jury, must be made to appear as utterly inapplicable and even unimportant in the proper determination of the cause. The opposing counsel must be made to appear as having wholly and completely failed to see or present the vital part of the case. And by then stressing the strongest points in his side of the cause as the vital issues in the cause, the attorney is to reconstruct the whole problem before the jury, gradually and logically. And against those points in the case where opposing counsel has seemed most effective against him, the attorney is to hurl his most powerful ridicule, satire, and logic; while the utmost of his eloquence is to be used in establishing in the minds of the jury the pre-eminent importance of those points in the case which flow to his side.

Through the use of every art which can be brought to bear in order to ascertain the unconscious bias of the court and jury, the legal strategist has become prepared to adjust his arguments and the status of his cause before court so that it may best appear as the justice of the cause on trial. For, inasmuch as it is because of the attorney's ignorance of the vulnerable phases of the judge's and jurors' personalities and opinions that he is least able to meet the forces operating against him, it will be because of his apprehension of these that he will be best prepared to make his legal adjustments and fittings. And these conclusions are pre-eminently applicable to lengthy, extended, and highly complex cases on trial. All the methods of the legal strategist proceed from the one great keynote of his purposes, *anticipation*.

The reader has perused these remarks with a critical attitude as regards their morality. The author must assert that he has discussed only what all attorneys understand to be very true regarding legal trials, and has done so without advocating in the least any of the methods dealt with. Our speculation has had to do with what is true regarding the conduct of legal trials, and all men we will concede to acquiesce in a discussion of anything that is true. But, it is to be remembered, our remarks are applicable only in the cases in which the attorney finds himself reduced to the point where he must rely upon strategy. The author, further, makes no advocacy of any of the methods of strategy in order that the attorney may win; but is simply speculating upon whether it might be possible through them to win.

The vulnerable phases of human personality, the sources from which error proceeds and extends, the aspects of legal character possible of being moulded according to his own designs and ends,—these are the concerns of legal strategy.

William W. Brewster.

His First Case

BY LULWORTH WINDSOR

ENTHAM, Illinois, is always quiet on an August afternoon, but the office of "Edward Williams, Attorney at Law," seemed the very source and center of the stillness that pervaded the village. It was a modest little ground-floor room, with three hard-bottomed chairs, a sawdust spittoon, and an ink-spotted table against the wall. On the table were ranged "Cooley on Torts," "Anson on Contracts," a copy of "Hurd's Statutes," and an old Illinois Digest. The slanting afternoon sun shone full on the shaded windows and into the half-opened doorway.

Edward Williams, Esq., was resting his feet on the table and vainly trying to keep awake long enough to comprehend a page of the volume before him. Suddenly he closed his book with a quick gesture of impatience, started to his feet, and began to walk nervously about the little office. His mother had worked and saved and he had worked and saved for his education. Now that he was through he had come back where they had lived since he could remember, and where his father had died when he was a little boy. Most of the fellows had sought openings in larger towns, but it seemed impossible for him to leave his mother, and equally impossible for her to go away from Bentham, so he had rented a vacant room on Main street, cleaned it up himself, swung his black and gold sign to the air, and hopefully undertaken to wait for clients.

They seemed long in coming. Occasionally he was called on to prepare a deed or some simple contract. Once he had been consulted by Jim Price when Jim thought his mother-in-law was going to die, but when the old lady passed away, leaving a considerable estate to be settled, the heirs all went over to Bloomville, the county seat, the day after the funeral, and put it in the hands of a prosperous law firm there. Several retired farmers who were living on the income of their farms and growing rich by the advance in land values made a practice of dropping in occasionally for a friendly chat, sometimes leading the conversation into such a channel as to get a little free advice on some matter of a fence or their tenants' rights. On one such occasion he had made a somewhat careful investigation of a question for Uncle Billy Andrews, who owned two of the finest quarter sections in the township. As that gentleman arose to take his leave, he said, "Well, I must be going. You won't charge me nothing for that, will ye? I just dropped in for a friendly chat."

"Yes, Mr. Andrews," said he, "that is a matter of some importance to you, and my advice has surely been worth something. My charge is $2." Uncle Billy counted out the two silver dollars from a huge leathern wallet and stumped angrily out of the door. He had not returned, and evidently cherished a grievance.

Mindful of the admonitions of his instructors, he had reread his textbooks and studied anew the lectures on real property, but that had palled, and now he felt that perhaps he had made a mistake after all, and that Bentham was no place to practise law.

With such reflections, he was walking nervously around the little room when a boy about a dozen years old stepped with noiseless bare feet into the open doorway.

"Hello Joe!" said Williams, "Come in."

The boy deposited the rifle he was carrying by the door, and sat down on the step. "I'll just sit here, Ed, I guess," he said.

"What you doing with that gun?"

The boy did not answer, but said, "Say, Ed, I'd like to have you tell me what I

ought to do about Stevens's old bull. You know their pasture is short and he keeps getting out and into our corn all the time. Pa met Stevens yesterday just as we were driving him out, and told him he wished he'd shut that critter up and keep him shut up. Stevens said if we had a lawful fence he wouldn't get through. Pa said it was a better fence than Stevens had on his half of the line, and that his corn had been damaged $25 worth a'-ready, and that Stevens would have to pay. Stevens said, 'You try to make me.' They both got pretty huffy. Say, Ed, what *is* a lawful fence? Pa says rather than have that corn all eat up, he'll make me stay out and watch the fence. Says I haven't got anything else to do." The boy got out his jacknife and whittled gloomily as he considered the wrongs he was likely to suffer.

"Well, your pa had a good deal better keep you watching that fence for a while till he gets around to fix it up than have a lawsuit with his neighbor," said Williams.

"That's all right, but no fence'll hold that bull," said Joe. "Say, you ought'a seen me knock the heads off of the gophers in the big pasture as I came through. They'd stand up as straight and stiff as little old men in front of their holes, and, biff! off would go their heads. I never missed a one. I can hit things on the fly, too. Throw up that piece of brick for me." The boy seized his gun and just as the brick hesitated in the air on the turn the rifle cracked and the fragment vanished in a puff of dust.

"Oh, I can shoot all right," said the boy proudly. "I can just feel when the gun is pointing right. I got a new box of cartridges to-day; that's what I came to town for."

As the boy trudged off homeward, Williams closed and locked his office, relieved that the monotony had been broken by his young friend.

The next afternoon the young attorney was surprised to have a call from Joe Wilson's father, who came into the office in no amiable mood.

"Say, Ed," he said, scarcely waiting to be seated, "I'm in a bad fix and I don't know whether you can help me out or not. It's all on account of Stevens's bull and my boy Joe. You see we've been terribly pestered by that critter's getting into our corn, and he's done a lot of damage. Last night Joe had been to town with his rifle and when he came home he cut through the field and there was the bull in our corn again. He set the dog on him and the bull made for the gap in the fence where he'd broke in and took right across that plowed field there. Well, as he struck across the soft ground with the dog after him, making for the fence, his head up and his tail sticking right out behind stiff as a ramrod and broadside to Joe, the boy up with his rifle, and, sir, he shot that bull's tail right off; that is, the bullet fixed it so when Tige, the dog, jumped and grabbed the brushy end of it, it came right off in his teeth. Stevens is awful mad and has gone to Bloomville to hire a lawyer to sue me. He says the bull is likely to die and that he is a valuable animal. I guess he is pure bred all right."

While Mr. Wilson was yet speaking the door opened and Lige Peavey, the constable, came in.

"Say, Mr. Wilson," he began, "I've got a paper to serve on you," and he proceeded to read a summons commanding William Wilson, the defendant, to appear before Andrew Hinckley, justice of the peace, on the 28th day of August, 1892, at 9 A. M. to answer the demand of John C. Stevens, the plaintiff, in damages, etc., etc., in the sum of $200.

"Go there or not, just as you please," said Lige, "I've done my duty. Squire Hinckley issued the summons on a telephone message from Major Brinsmaid at Bloomville. He said he was Stevens's lawyer, and that the case was dead open and shut. Said he guessed he'd make you sweat, Mr. Wilson. But I don't know anything about it," he added, "I've done my duty."

As the constable withdrew, beads of perspiration glistened on Wilson's brow. "Why, that bull wasn't worth $50, he said. "He isn't hurt, anyhow. I can prove by all the neighbors that he is the meanest, breachiest critter in the township. This is an outrage, a holdup. I'll hire all the lawyers in Bloomville. I'll show that Stevens I can put up as much as he can. I'll law him to a finish," and

the irate farmer strode up and down in great excitement.

"Don't get excited, Mr. Wilson," said Williams. "Sit down and let us go over the facts again," and after a careful questioning of his client and a quick reference to "Cooley on Torts," he said: "I don't think it will be necessary for you to employ a large number of lawyers, Mr. Wilson. If you care to intrust your case to me, I think I can win it for you; but if you prefer to employ an older lawyer, of course I can't blame you."

The young man was evidently sincere, and after a moment's thought his client said: "I'm going to leave it to you, Ed. I believe we can beat them."

But as they talked over the case, the attorney soon found that his client had very positive ideas on how it should be conducted and that any serious opposition on his part would mean the loss of the client.

"I'll tell you," said Wilson, "we've got to prove the reputation of that bull, and we must have plenty of witnesses on that."

He spent most of the time before the trial talking about the case and causing everyone to be subpœnaed as a witness who betrayed the slightest animosity to the unfortunate bovine. He had Jim Hall subpœnaed, because Stevens had said to him the summer before that "bulls are generally breachy;" and Lige Peavey chuckled as he saw his mileage piling up.

Williams did not seek to interfere with his client's activity, but simply verified his citations, and noted them on a half sheet of paper.

The plaintiff had been not less active than the defendant in interviewing witnesses and causing them to be called, and on the morning of the trial the old town hall was well filled with witnesses, the adherents of the two factions, and many curious to hear the noted Major Brinsmaid. He had won fame and a wound on the battle field during the Civil War. He was known far and wide as a stump speaker and politician. His power with a jury was well known, and he was personally acquainted with every man in the county. Among his fellows at the bar at the county seat it was well understood that the major was better on the facts than on the law, but that did not penetrate to Bentham, and he was the ideal lawyer in the minds of most of the county. Men had been known to quarrel, then suddenly stop, mount their fleetest horses and race to Bloomville to employ Major Brinsmaid, and the loser of the race to admit defeat without going to court.

Wilson seemed everywhere that morning at once, talking to witnesses, whispering to his young attorney, and growing more nervous every moment. It was eviden that he felt that the whole burden of the case rested on him, and he proposed to leave no stone unturned.

Stevens had not appeared; but shortly after 9 o'clock the train whistled, and a few minutes later the great Major Brinsmaid appeared, triumphantly escorted by Stevens and his line of witnesses. The major was a tall, florid man, who wore a frock coat and a white vest, and greeted all present affably.

"All ready, Judge," said he. "We'll take the jury," with a pleasant smile and wave of the hands to the jury, who were evidently flattered at this recognition and favorably disposed at the outset.

"We'd better take them too," whispered Williams, but Wilson demurred. Three jurors were peremptorily challenged and two others questioned in a manner that did not tend to make them friendly to the defendant. When the panel was finally completed to Wilson's satisfaction, Brinsmaid again took them with a wave and a smile, which, his young opponent noticed, brought an instant response from the jury box. Wilson had gradually worked himself into a condition of great nervous excitement, plainly shared by Joe and his mother, who sat just inside the rail. His young attorney seemed so cool and unconcerned that he regretted more than once that he had not gone to Bloomville for a lawyer who would appreciate the gravity and importance of the case. And his nervousness did not diminish as Major Brinsmaid made his opening statement to the jury. The great lawyer began by complimenting them upon their evident intelligence and fairness.

"The jury system is the bulwark of American liberty, to which may resort

the oppressed and injured, sure of justice and redress," he said; and then went on to explain the facts of the case, how a valuable animal had been wantonly, wilfully, and cruelly injured. "This, gentlemen, is what is known in law as a 'tort,' a wilful, wicked trespass, calling not only for compensatory damages, but additional damages as 'smart money,' to teach the defendant a proper respect for the rights of others. The animal was shot by the son of defendant, as will be shown by the testimony of at least three eyewitnesses, and we will show by competent evidence the value of the animal and the damage done." "Furthermore," thundered the major, "we will show by at least two credible witnesses that the defendant, since this suit was brought, has undertaken to trump up perjured testimony by trying to induce them to come here and swear to what they know is not true," and he shook an accusing finger in Wilson's face, as that worthy shrunk and cowered in his seat.

As the major wiped the sweat from his face and back of his neck with an enormous pocket handkerchief and took his seat, an old farmer in the rear of the hall said audibly, "No use of Ed Williams trying to say anything. The major has got the case won a'ready." And the man next him said, "Sure."

The young lawyer felt all eyes upon him as he rose in his place. He had planned the case carefully, without confiding his views to his client. Wilson now looked to him, hoping against hope that he would unloose some unsuspected fountain of eloquence which might offset the powerful effect of the major's opening, which he could feel had turned the popular tide against him. His heart sank when his lawyer said simply, "With the permission of the court, the defendant will reserve his opening statement until the close of the plaintiff's case."

"We object to that," said the major. "We have fully and fairly stated our case. We won't stand for any trickery," and again he looked at the jury for their assent.

"The objection is sustained," said the justice. "You may make an opening statement or not, as you choose, but if you make one you will make it now."

Again Wilson looked in vain to his counsel. "Very well, your Honor, the defense will make no statement," said Williams, and sat down. Wilson in intense disgust leaned over and in a hoarse, angry whisper, audible to the front row of spectators, said: "Why didn't ye speak up and tell about that bull? That's what I got ye fer." Gloom settled on the adherents of the defense. Joe Wilson began to cry softly and his mother's face was the picture of despair. And by so much as the Wilsons were cast down did the spirits of the Stevens family rise. Stevens smiled, little Johnny snickered, and Mrs. Stevens cast a look of triumph at Mrs. Wilson which that lady never forgot or forgave.

"Witnesses for plaintiff stand up and be sworn," said the justice. Nearly twenty arose, held up their right hands while he mumbled the oath, and sat down as the plaintiff took the witness stand.

Replying to the major's questions, the plaintiff said: "Yes, my name is John Stevens. I am the plaintiff in this suit. I know the defendant. This suit is for damage done my bull. He is a valuable animal, or was before he was shot. I know what he was worth. He was worth a hundred and seventy-five dollars, pure bred and registered. No, he was never vicious or breachy; always gentle and kind!" "Ask him what he told Jim Hall last summer," said Wilson in a stage whisper, but his attorney paid no heed. "No, he is of no value now, because he was shot a week ago yesterday," continued Stevens. "Joe Wilson shot him and he is the son of defendant, about twelve years old. He is sitting there now," and all eyes turned to Joe, who wished he had never been born.

"Take the witness," said Brinsmaid.

"Did you see Joe Wilson shoot the bull?" asked Williams.

"Yes, I did," said the witness. "He was running across the field with his tail sticking right out behind, and Joe upped with his rifle and fired and the tail seemed to break right in two and then the dog grabbed it and off it come," said the witness.

"That's all," said Williams, and the witness started to leave the chair, but Wilson sprang to his feet.

"Wait a minute," said he, "I want that witness to answer some more questions, and if my lawyer here don't ask for me, I'll ask them myself."

"I object," shouted Brinsmaid. "The defendant is represented here by counsel of his own selection and must ask his questions through him if at all."

The crowd was on tiptoe with excitement. Never before in Bentham had an attorney been so humiliated in open court. Ed Williams's face flushed crimson as he rose and faced his client.

"Mr. Wilson," said he, "from the day you employed me in this case you have sought to manage it yourself, and shown in a multitude of ways you did not trust me. I told you then, and I tell you now, that if you intrust it to me, I think I can win it. But you will sit down right now and let me manage this case or I will leave the room and let you run it to suit yourself."

The spirit with which the young attorney spoke and the evident justice of his position appealed strongly to the spectators.

"Sit down, Bill, said one, "the boy's doing all right," and the spectators cheered as Wilson, after a moment's hesitation, sank into his chair. And then Williams resumed his seat, the victor over his client, if not over his adversary.

The case moved on quickly. Mrs. Stevens was called, following her husband, and began volubly when Williams quietly objected that she was an incompetent witness, being the wife of the plaintiff, and she was forced to leave the stand, looking daggers at Williams as she did so.

Johnnie Stevens then told the same story of the shooting as his father, and Dr. Hume, a veterinary surgeon, was called to the stand and was being asked about the value of the animal and the extent of his injuries, when Williams arose and interrupted, "With the court's permission," said he, "I desire to make an inquiry of the learned counsel for the plaintiff."

"Ask me any question you please. I'll answer it for you," said Brinsmaid, without taking his eyes off the jury.

"I notice that this witness is called upon another branch of the case from the two former, and would like to know if there are any more witnesses to be called as to the manner in which the alleged injury was done."

"There are no more witnesses on that," said the major testily, "Ain't two enough? You don't deny it, do you?"

"In that case," said Williams, "I have a motion to present which may as well be made now as later, and which, in case it prevails, as I think it will, will render it unnecessary to take further testimony in the case."

The young man spoke firmly and distinctly, but only two persons in the room seemed to grasp the import of his words. They were Squire Hinckley and Major Brinsmaid. The court leaned forward with an expression of interest and said, "You may make your motion Mr. Williams," while, as Williams proceeded, a vacant, helpless look seemed to overspread the major's countenance.

"I move the court to dismiss this case and render a judgment for costs against the plaintiff," said Williams slowly and distinctly," on the ground that this action sounds in tort and on the plaintiff's own testimony, sworn to in open court here. On every particle of evidence adduced it appears that the shot was fired by the defendant's son Joe, who is twelve years old, and legally an infant. Now, the law is well settled in Illinois that a man is not liable for the torts of his infant son. I call your Honor's attention to Paulin v. Howser, 63 Ill. 312, a case somewhat similar in its facts to the case at bar," and picking up the volume he began to read.

The spectators but dimly understood the proceeding. They were anxious to hear the testimony as to the bad reputation of the bull, and several of the expectant witnesses had thought up some rather coarse jokes which they hoped to have an opportunity to get off on the stand. They hoped young Williams would not take up too much time. Of course he could not win against Major Brinsmaid, but he had to make some sort of a showing, and since he evidently could not say anything himself, perhaps it was right he should have a chance to read something out of a book.

But as he laid down one book and

picked up another, saying as he did so, "The principle is not peculiar to Illinois, but obtains in Maine, Michigan, New York, and other states,"[1] and went on reading book after book, the jury and spectators began to see that there was something the matter with the plaintiff's case, though they did not know what it was.

"By Jocks, looks like the Major'd struck a snag," said the old farmer in the rear of the hall. "Looks like it," said the man next him.

At the close of the clear and concise statement of the law by the young attorney, Major Brinsmaid ponderously arose, and, striking an attitude designed to impress the jury, said condescendingly to his young opponent, "Why, sir, I am surprised,—yes, surprised, that you should make such an argument. Of course, your Honor," addressing the court, "our young friend is inexperienced and we can forgive him for making such a claim, but older lawyers are better informed. Why, your Honor well knows that only last month a case very similar to this was tried before your Honor without a jury and your Honor rendered a judgment against the defendant for $75, and he paid it before leaving the court room."

"Yes," said the court," and you represented the defendant, Major. But I do not recall that you raised this point. In any event do not cite me as overruling the supreme court. What I want to know is whether you have any authority that reverses or modifies Paulin v. Howser. The facts seem very like these."

Major Brinsmaid again wiped the back of his neck. "There's plenty of it," he snapped, "but I didn't bring my whole library."

"Well," said Squire Hinckley, "there is no dispute about the facts. All agree that Joe Wilson fired the shot that did the damage. There is no evidence that he did it at the request or direction of his father, the defendant. The defendant was not there and under the authorities cited is not liable. There is nothing for the jury to pass upon. The case is dismissed. Judgment against plaintiff for costs. The jurors are excused with the thanks of the court.

"Well, Mr. Wilson, we've won," said Williams to his client, who sat in his chair uncomprehending, as the jury began to file out. "What's that? The case isn't over is it?" "Yes, and we've won; didn't you hear what the squire said?" "Well, I swan," said Wilson, "if it aint enough to make a man mad to stop a case right in the middle. I want to show up that bull and I've got the witnesses to do it. That's what I want. A judge that'll quit in the middle and shut a man off is no judge at all. He hasn't heard a one of my witnesses. I'm not satisfied with the way this case has been handled, I tell you that right now.

"That Ed Wilson'll make a lawyer yit. He did that pretty slick," said the old farmer as he was crowded through the door.

"That's no lie," said the man next him.

[1] That a parent is not liable for the torts of his infant child. Hagerty v. Powers, 66 Cal. 368, 56 Am. Rep. 101, 5 Pac. 622; Maddox v. Brown, 71 Me. 432, 36 Am. Rep. 336; Brohl v. Lingeman, 41 Mich. 711, 3 N. W. 199; Tifft v. Tifft, 4 Denio, 175. See note to Broadstreet v. Hall, 10 L.R.A.(N.S.) 933.

Editorial Comment

Case and Comment

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Effect of War on Negotiable Instruments Payable to or by Alien Enemies

Inasmuch as the payment, during the war, of a bill of exchange or promissory note made prior thereto is alike forbidden by the nonintercourse rule and the augmentation-of-the-enemy's-resources rule, it follows, states the annotator of this subject in L.R.A.1917C, 671, that during the war the rights of the parties remain in suspense. The presentation of a note for payment at maturity, or of a bill of exchange for acceptance or payment, and the giving of notice of dishonor to a drawer or indorser stand excused during the continuance of war between the countries of the parties concerned, and until a reasonable time after the restoration of peace.

Thus, it is held in Peters v. Hobbs, 25 Ark. 67, 91 Am. Dec. 529, that the suspension of commercial intercourse by the breaking out of war between the country of the maker and that of the payee will excuse presentation of a note for payment when due; and such failure continues to stand excused during the time that such hindering cause exists; and to comply with the requirements of the law as soon as the cause is removed is due diligence.

So presentation of a bill of exchange for payment at maturity is excused where, after its acceptance, but before its maturity, all intercourse between the parties has become prohibited by the laws of war. Dunbar v. Tyler (1870) 44 Miss. 1.

But reasonable diligence will not require the sending of a notice of protest to an indorser of commercial paper by the very first mail sent out, because the sending of such mail might not be known, or might not be safe if known; but such notice must be given when the mail becomes regular and notorious and safe. Morgan v. Bank of Louisville, 4 Bush, 82.

While it has been suggested in one case, United States v. Barker (1882) Fed. Cas. No. 14,519, that notice of protest and nonacceptance should be given by sending it through a neutral country, if such a course is possible, the cases seem tacitly to take the view that the requirement of due diligence is satisfied where notice is given upon the notorious resumption of direct intercourse. It has been held that the duty resting upon the holder of a note to give notice of its nonpayment to an indorser is not discharged by a deposit of a notice of protest in the postoffice at a time when open war prevails between the country of the holder and that of the indorser, and there is no longer any actual mail communication between them. He cannot cast upon the

government the burden of preserving his letter until the termination of hostilities. Harden v. Boyce (1870) 59 Barb. 425; Shaw v. Neal (1867) 19 La. Ann. 156; James v. Wade (1869) 21 La. Ann. 548. Nor, where the indorser has departed from his place of residence and gone into the enemy's lines, is the leaving of a written notice of protest at his residence sufficient to render him liable. McVeigh v. Allen (1887) 29 Gratt. 588; Alexandria Sav. Inst. v. McVeigh (1887) 84 Va. 41, 3 S. E. 885.

A promissory note will not bear interest after maturity during the period of the war, unless the holder has an agent in the country to whom the debt may lawfully be paid.

Payment of a note or bill of exchange, given to one who has become an enemy, may be enforced during the war by a fellow citizen or neutral to whom it had been transferred before the war broke out. It was held in Wilson v. Ragosine & Co. [1915] 84 L. J. K. B. N. S. 1285, 113 L. T. N. S. 47, 31 Times L. R. 264, that a bill of exchange given to a firm one of the members of which has become an alien enemy, and having an enemy domicil, may be enforced by an English partner who has received it upon an apportionment of the assets between the parties upon a dissolution prompted by the imminence of war.

Though the point seems never to have been decided, the principle that payment of a debt during war will not be permitted where the effect will be to augment the enemy's resources would seem to preclude the enforcement by a neutral of an obligation acquired by him after the outbreak of war, from a resident in the enemy country.

The assignor of a promissory note becomes liable to the assignee where presentation of and suit upon the note are prevented by nonintercourse resulting from the war. Graves v. Tilford (1865) 2 Duv. 108, 87 Am. Dec. 483.

Missouri Bar Association

The thirty-fifth annual meeting of the Missouri Bar Association will convene at the Baltimore Hotel, Kansas City, Missouri, September 27, 28, and 29, 1917.

It is the purpose of the Association to carry on a roll of honor the names of all its members who have entered the military service of the nation.

Reformation as Affecting Right of Divorce on Ground of Drunkenness or Use of Drugs

Reformation of an habitual drug user, party to a marriage contract, between the time of separation and that of bringing divorce proceedings based on such use, it is held in the Mississippi case of Smithson v. Smithson, 74 So. 149, will defeat the proceedings, although they are brought within a reasonable time after separation.

The annotator of this decision in L.R.A.1917D, 361, observes:

This case finds support in Allen v. Allen (1900) 73 Conn. 54, 84 Am. St. Rep. 135, 46 Atl. 242, 49 L.R.A. 142, action for divorce on the ground of habitual intemperance, which held that evidence of the habits or condition of the defendant subsequent to the commencement of the action is admissible for the defense, since a divorce concerns the state as well as the parties, and a condition justifying it must be found to exist at the very time when the divorce is granted. Allen v. Allen, in holding that a reformation at any time before the granting of a divorce will be sufficient to defeat the action, goes further than the decision in Smithson v. Smithson, which goes only to the extent of holding that a reformation effected at the time of the commencement of the action is sufficient to defeat it.

The court in Smithson v. Smithson stated that the statute involved in that case did not authorize divorcement for the habitual and excessive use of narcotics for a fixed time, but gave to the injured party merely a right to a divorce when it could be shown that the conditions existed when the relief was sought; and so that fact will probably serve to distinguish Smithson v. Smithson from Tarrant v. Tarrant (1911) 156 Mo. App. 725, 137 S. W. 56, action for a divorce under statute making habitual drunkenness for one year ground for divorce, which held that the fact that defendant became cured of his habit after his hav-

ing been addicted to it for the statutory period and the suit had been commenced would not defeat the action where there had been no condonation. The court stated that defendant could not be too highly commended for his final success in overcoming the habit, which appeared to have been the only substantial fault of an otherwise good man; but his success came too late for the law to aid him, so classing actions for a divorce on the ground of habitual drunkenness with actions for divorce on the ground of desertion, where the rule is that if the desertion has continued for the statutory period the deserted party may rely on his acquired right and refuse cohabitation. The court in Tarrant v. Tarrant cited and relied upon a dictum in Moore v. Moore (1890) 41 Mo. App. 176, to the effect that where a husband is shown to have been an habitual drunkard for just one year, and no more, the offense is distinct and complete, and though it then cease the wife can maintain an action for divorce.

Smithson v. Smithson finds further support in Meathe v. Meathe (1890) 83 Mich. 150, 47 N. W. 109, where a divorce was refused the husband on the ground of habitual drunkenness of wife, where it was shown that for six months prior to the commencement of the action she had lived a life of total abstinence, although the husband had liquor constantly in the house and used it at his meals in her presence. And in Gourlay v. Gourlay (1890) 16 R. I. 705, 19 Atl. 142, action for divorce on account of habitual drunkenness, it was held that to sustain the charge the habit must be shown to have continued up to the time of the commencement of the action. Likewise, in McMahon v. McMahon (1910) 170 Ala. 338, 54 So. 165, action for divorce under statute authorizing a divorce "for becoming addicted after marriage to habitual drunkenness," it was held that the habit must be fixed and must continue until the suit is brought.

How Canada Takes Care of Soldiers' Children

How Canada provides for the wives and children of her enlisted men is described in a report by Mr. S. Herbert Wolfe of New York, prepared at the request of the Secretary of Labor and published by the Children's Bureau of the United States Department of Labor.

In presenting the report Miss Lathrop, Chief of the Children's Bureau, says:

> In the fifty years since the Civil War, legislation affecting the family and its economic status has shown marked growth. Mothers' pension laws and minimum wage laws are recognized examples, and it is acknowledged that their result has not been to pauperize, but distinctly to improve the power of the family to protect itself. In view of this tendency it is to be expected that a system of compensation for soldiers and sailors can be developed whereby the government will make possible for their children the home life and parental care which are the common need of every child.

The report points out that in Canada two notable elements have been added to the government provision for soldiers and their families: First, insurance on the lives of soldiers is carried by various municipalities; and second, the Dominion has undertaken as a part of its military system the re-education, in a suitable occupation, of the disabled soldier, so that he can assume again, in whole or in part, the care of his family.

The Canadian compensation for the soldier and his family includes not only $33 of monthly pay for the private in active service, but a separation allowance to his dependents of $20 a month from the Dominion government, and further assistance in special cases from the Canadian Patriotic Fund.

For example, the wife of a private soldier with three children between the ages of ten and fifteen may receive either $15 or $20 from the assigned pay of her husband, $20 separation allowance, and $25 from the Canadian Patriotic Fund, or in all $60 or $65 a month.

If her husband is killed, she will receive $40 a month for herself, and an additional $6 a month for each of her children until her boys are sixteen years of age and her girls are seventeen years of age. In addition, if she lives in Toronto or one of a number of other cities, she will receive life insurance. This will be paid to her in monthly instalments, unless she shows that she needs the entire amount at once to pay off a mortgage or to make a start in business.

If her husband is disabled, she will receive a special maintenance allowance while he is having medical treatment and learning a new occupation, and when he is finally discharged, if his physical disability continues, a pension will be paid according to the extent of his disability and the number of his children under sixteen or seventeen years of age.

In Toronto, the municipality has not only purchased $10,000,000 worth of insurance from private companies, but it is itself carrying more than $32,000,000 worth of insurance. A municipal insurance bureau has been organized and $2,000,000 worth of bonds have been issued, of which the principal and interest are a charge upon the general taxpayers of the city. Every officer and enlisted man residing within the city limits of Toronto who volunteers for over-sea service has from the date of his enlistment been protected by a life insurance policy of $1,000, the protection running from the time of his enlistment to his death or six months after his discharge or resignation.

The report refers also to the fact that each of the European countries makes government provision for the families of private soldiers and sailors. In Great Britain, France, and Germany the amount of the governmental separation allowance depends upon the size of the family which must be supported.

Acceptance of Retainers to Represent Interned Alien Enemies

The Committee on Professional Ethics of the New York County Lawyers Association has made the following answer to the subjoined inquiry:

Question No. 148.

I desire to be advised as follows: If it be proper for an attorney to take a retainer with a view to interceding on behalf of alien enemies, in the event that they be interned by the authorities of the United States. By this intercession I mean that the attorney would be required to seek permission to interview the aliens at their internment camp and thereafter submit to the proper authorities whatever proof can be obtained with a view to their release.

Further, I desire to be advised, if the attorney be of the opinion that the authorities, both military and civil, acted without warrant for the apprehension of the aliens, would the attorney be justified in seeking to obtain a writ of habeas corpus if he found himself in a position wherein he might be required to obtain half a dozen writs for said aliens.

Answer.

In view of the subcommittee's report (which report this committee approves), it is the opinion of the committee that both inquiries should be answered in the affirmative. The subcommittee's report is as follows:

In England it is settled law that an alien enemy who is a prisoner of war is not entitled to the writ of habeas corpus to examine into the propriety of his detention (Three Spanish Sailors, 2 W. Bl. 1324, 96 Eng. Reprint, 775; Rex v. Schiever, 2 Burr. 765, 97 Eng. Reprint, 551). The question whether an alien enemy who is interned by the government has a different legal status from that of a prisoner of war has recently been considered in England and Canada. In Rex v. Vine Street Police Station [1916] 1 K. B. 268, 86 L. J. K. B. N. S. 210, 80 J. P. 49, 32 Times L. R. 3, 113 L. T. N. S. 971, (1916) the King's bench (Bailhache and Low, JJ.) held that a German subject residing in the United Kingdom who in the opinion of the executive government is a person hostile to the welfare of the country, and is on that account interned, may properly be described as a prisoner of war, although not a combatant or a spy, and as such is not entitled to the writ of habeas corpus. A similar decision was rendered by the Canadian court, in Re Gusetu (1915) 24 Can. Crim. Cas. 427.

In this country, the question whether an alien enemy who is a prisoner of war is entitled to the writ of habeas corpus to review the legality of his detention has apparently never come before the courts. Much less has the question whether an interned alien enemy is on the same footing as an alien enemy who is a prisoner of war been considered by our courts. Under these circumstances, and until there has been a final ruling upon this subject, a lawyer, properly retained by an interned alien enemy or by his friends, would be justified in taking the proper legal proceedings to have the question of the legal status of the interned alien enemy, and of the legality of his internment, determined by the court. A person restrained of his liberty without a trial should have the right to apply by counsel to the ordinary judicial tribunals to have the legality of his detention determined, unless this question has been settled by decisions of such controlling authority as to render the application a useless proceeding.

Readers' Comments

Decisions of Cases Upon the Merits.

Editor CASE AND COMMENT:

In the case of Daimler v. Continental Tyre & Rubber Co. [1916] 2 A. C. 307, 6 B. R. C. 269, 22 Com. Cas. 32, 85 L. J. K. B. N. S. 1333, 114 L. T. N. S. 1049, W. N. 269, 32 Times L. R. 624, 60 Sol. Jo. 602, the plaintiff was a corporation incorporated under the law of Great Britain. Its stockholders, however, were all Germans. The question was whether the court could look behind the certificate of incorporation and see the real character of the company, and treat it as an alien enemy which had no right to recover assets belonging to an English citizen. The House of Lords, reversing the decision of the court of appeals, held that the court had power to deal with the real facts in the case, although the form of the organization obscured them. To use the language of Lord Halsbury: "When the object to be obtained is unlawful the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness." Lord Mersey, Lord Parker of Waddington, and other distinguished judges concurred. It is interesting to note that several of the judges who sat in the case said they had prepared opinions, but they found that of Lord Parker so satisfactory that they decided to withdraw them.

A recent decision of the Supreme Court of the United States rests upon the same principle, although in an entirely different case.

The Supreme Court, in Hart Steel Co. v. Railway Supply Co. 244 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 506, decided May 21, 1917, held that it could consider who held the stock of a particular corporation, and that when it appeared that the stock of this corporation was held entirely by another corporation the latter was bound by a judgment against the former as much as if it had been a party to the suit. This judgment also was a reversal. The circuit court of appeals had decided differently.

A committee of the American Bar Association, sometimes called the Committee on the Law's Delay, has been endeavoring for ten years to promote the decision of cases upon the merits, without regard to technical errors or forms of procedure that do not affect the merits. That principle already prevails, mainly by legislation, but partly by rule of court, in twenty-seven states of this Union. It is a great satisfaction to see that the fundamental principle upon which this activity of the committee has been based is thus adopted by the highest courts of America and England.

Everett P. Wheeler.

Suggests a Moratorium.

Editor CASE AND COMMENT:

The exigencies of the present war have not only created conditions which have materially increased the cost of food and other necessaries of life, but have also afforded opportunities to the mortgage loaners to take advantage of the necessities of the borrowers. This may force us into a moratorium, as I have more fully explained in letters addressed by me to President Wilson, Governor Whitman, and our representatives in Congress, as follows:

"As you are probably aware, the situation with respect to the mortgage loan market is daily growing more acute and serious. The savings banks, life insurance companies, trust companies, and other large financial institutions which have been accustomed to make mortgage loans on real estate aggregating millions of dollars every month, have now shut down completely and refuse to consider any application, no matter how large the equity or how ample the security. Their excuse is that they are obliged to stand back of the Liberty Loan and be prepared to subscribe to, or to underwrite, any future bond issues to supply the necessary funds for carrying on the war against Germany.

"In the meantime, mortgagees generally, both corporate and individual, unmindful of their patriotic duty to 'do their bit' by making it easier for the mortgagors in these days of financial stress and strain, are now calling their mortgages, or insisting upon large payments on account, so as to reduce the principal to so small a sum as to leave them, the mortgagees, absolutely safe, no matter what happens, thus shifting all the burden and risk on the poor mortgagors. This in spite of the fact that the property is kept in a good state of repair and the interest and taxes are promptly paid.

"The consequence is that the number of mortgage foreclosures has greatly increased, and as new loans cannot be obtained except from 'loan sharks,' who exact exorbitant rates, we are rapidly approaching such a condition of affairs as may result in a most disastrous money panic, which will affect rich and poor alike, and thus give aid and comfort to the common enemy.

"If the loaning interests are not sufficiently intelligent or loyal to refrain from seeking to take advantage of their debtors in these abnormal times, then the government, Federal or state, must intervene and establish a moratorium, as has been done by so many of the countries now engaged in the great world war."

It seems to me that this is a timely and pressing topic for public discussion.

Gilbert Ray Hawes.

Among the New Decisions

"Four things belong to a judge: To hear courteously, to answer wisely, to consider soberly and to decide impartially."—Socrates.

Action — by conditional vendee — real party in interest. That a conditional vendee in possession of an automobile may maintain an action for negligent injury to it, notwithstanding a statute requiring actions to be prosecuted in the name of the real party in interest is held in the Washington case of Stotts v. Puget Sound Traction Light & P. Co. 162 Pac. 519, annotated in L.R.A.1917D, 214.

Banks — refusal of charter. That a statute regulating banks and banking does not justify the refusal by the banking board of a bank charter, where the proposed stockholders have paid in the banking capital of the proposed new bank and possess the qualifications required by the statute, and have in all respects complied with the law is held in the Nebraska case of State ex rel. Wooldridge v. Morehead, 161 N. W. 569.

The question whether a charter or license for a bank may be refused upon general considerations of public policy is discussed in the annotation appended to this decision in L.R.A.1917D, 310.

Bond — to wife — liability of surety. A penal bond executed by a husband to his wife by way of compromise and settlement of difficulties between them, binding him by its condition to resume and maintain his marital and family relations with her and their children and provide them support and maintenance, is held founded upon a good and sufficient consideration, in the West Virginia case of Bolyard v. Bolyard, in 91 S. E. 529, annotated in L.R.A.1917D, 440, and is not forbidden by any positive law or public policy. The surety in such a bond is liable thereon for a breach of its condition, in an action at law brought by the wife.

Carrier — motor car driver — negligence — imputing to passenger. Where a passenger is traveling upon a motor car operated over the tracks of the railway company by license implied or express, the negligence of the operator of the motor car it is held in the Oklahoma case of Midland Valley R. Co. v. Toomer, 162 Pac. 1127, L.R.A.1917D, 344, cannot be imputed to such passenger in an action against the railway company for injury received while the motor car was on the track of the defendant railway company. The rights of a passenger upon a motor car operated on the tracks of a railway company by license are not measured by the same rule that would measure the rights between licensee and railway company.

Contempt — interfering with sentence. The custody of a prisoner who

is serving under sentence of a court is regulated by statute, not by judicial orders, and an interference with such custody or a violation of statutory regulations is held not a contempt of the court, though such interference or violation may be redressed by due course of law in the Florida case of Ex parte Turner, 74 So. 314, annotated in L.R.A.1917D, 355.

Contempt — reflection on court. The supreme court of Florida, it is held, in Re Hayes, 73 So. 362, L.R.A.1917D, 192, has the inherent power, independent of statutory authority, to punish as for a direct contempt any person who during the pendency of a cause before this court publishes an article referring to such cause, which reflects upon the efficiency and integrity of the court.

County — employing attorney — contingent fee. A contract between an attorney and a board of county commissioners by which the attorney for a contingent fee undertakes to collect a dormant judgment of long standing is held not necessarily void solely because of the contingent character of the fee provided for in Miles v. Cheyenne, 96 Neb. 703, 148 N. W. 959, annotated in L.R.A. 1917D, 258.

Generally speaking, there seems to be no reason why in the absence of statute or ordinance a public body authorized to employ an attorney may not agree that his compensation be partly or wholly contingent.

There are a number of cases sustaining such an employment by a county.

Death — unmarried person — action by parent. A woman who survives her husband for thirty minutes after an accident which kills them both is held within a statute providing that if deceased be unmarried the action for death may be brought by the father or mother in the Colorado case of Myers v. Denver & R. G. R. Co. 157 Pac. 196, L.R.A.1917D, 287.

No earlier case has been found construing a statute authorizing an action by the parents of the unmarried person as affected by the definition of the word "unmarried."

Divorce — failure to award alimony — subsequent amendment. Where a divorce dissolves the marriage and terminates the husband's duty to support the wife, a decree failing to award alimony it is held in the Iowa case of Spain v. Spain, 158 N. W. 529, annotated in L.R.A.1917D, 319, cannot be subsequently amended so as to make such allowance, even though the statute provides that the court may make such order in relation to maintenance.

Eminent domain — depreciating value of property — odors. Depreciating the value of property by the construction in its vicinity of a sewage disposal plant, the odors from which spread over it and render occupation of it uncomfortable, is held not a taking for which compensation must be made under the Constitution in the Maryland case of Taylor v. Baltimore, 99 Atl. 900, L.R.A. 1917C, 1046.

Estoppel — after-acquired title — married woman. That a married woman living with her husband is not, nor is her heir, estopped by her deed, or any covenant of warranty therein, from setting up against her grantee an after-acquired title is held in the West Virginia case of French v. McMillion, 91 S. E. 538, L.R.A.1917D, 228.

Evidence — privileged communication — confessions to session. Confessions by a member of the Presbyterian Church when brought before the session for discipline are held within a statute forbidding any minister of the Gospel to disclose any confidential communications properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office in the usual course of practice or discipline in the Iowa case of Reutkemeier v. Nolte, 161 N. W. 290, annotated in L.R.A.1917D, 273.

Gift — stock of goods — key. That a valid gift causa mortis of a stock of goods contained in a storeroom may be made by delivery of the key to such storeroom to the donee or his agent is held in the Florida case of Szabo v. Speckman, 74 So. 411, L.R.A.1917D, 357.

Husband and wife — contract — validity. An express contract between

husband and wife that she shall receive reasonable compensation for extra and unusual services rendered him outside of her domestic duties is held valid in the Nebraska case of Re Cormick, 160 N. W. 989, annotated in L.R.A.1917D, 265, and, when established by a preponderance of the evidence, is enforceable against him or his estate.

It seems to be unquestioned that at common law a contract by a husband to pay his wife for her services was invalid. This was because of a want of parties and of the wife's lack of power to contract based on the legal fiction of the unity of husband and wife. And in addition, the wife's earnings belonged to the husband, he having an absolute right to her time, services, and earnings. The strictness and rigidity of the common-law rules in this respect, however, have been greatly relaxed and modified by legislative enactments, furthered, in some instances, by liberal construction of such statutes by the court. As a consequence of this relaxation the now important question is as to whether or not these various statutes and they vary considerably as to phraseology—so enlarge the rights of a wife as to permit her to validly contract with her husband for her services in any manner, and if so as to what kind or kinds of services. Upon these questions there is a wide divergence of conclusion, but this is largely due to the variations in the language of different acts, some of such acts still being rather narrow whereas others are so broad as to grant almost if not unlimited rights of contract. Nevertheless, it seems to be universally conceded, even in those jurisdictions which have very broad statutes, that a married woman, unless permitted by positive legislative enactment, cannot contract with her husband for services which are imposed by her marital relations, the courts maintaining not only that it would be against all public policy to uphold such contracts, but that they are without consideration.

Injunction — against unlawful sale of liquor. Injunction does not lie at the suit of the commonwealth to prevent opening of places of business on Sunday for the sale of intoxicating liquor contrary to law is held in Com. ex rel. Atty. Gen. v. Ruh, 173 Ky. 771, 191 S. W. 498, L.R.A.1917D, 283.

Innkeeper — absence of fire escapes — liability. A hotel owner, it is held in the Nebraska case of Hoopes v. Creighton, 160 N. W. 742, may not omit to do the things that are reasonably necessary for the safety and protection of the guests of the house, and if he disregards the provisions of the law concerning the establishment of fire escapes upon the building, and such other devices as the law provides for, he will be held liable for the damages sustained because of the death of any guest which may be brought about by his negligence. This decision is accompanied in L.R.A.1917C, 1146, by supplemental annotation on the liability for injuries caused by lack or insufficiency of fire escapes.

Insurance — assignment. The owner of a policy of insurance who has parted with the title to the premises is held not entitled to assign the policy, after a fire, and without the knowledge and consent of the insurance company which issued the policy, so as to make it liable to a third person for the loss in the Nebraska case of Stephenson v. Germania F. Ins. Co. 160 N. W. 962, L.R.A.1917D, 307.

An extended search has failed to reveal any other cases involving the effect upon the rights of the grantee of the insured property or an assignee of the policy, without the insurer's consent of a statute providing against forfeiture for breach of warranty or condition which does not contribute to the loss.

Jury — failure to swear — effect. Failure to swear the jury in a criminal case is held to deprive accused of his constitutional right to a jury trial, in Howard v. State, — Tex. Crim. Rep. —, 192 S. W. 770, annotated in L.R.A. 1917D, 391.

This decision, that the jury must be sworn in each criminal case and that the failure to do so is fatal to a conviction, is sustained by the overwhelming weight of authority, and in the absence of such a statutory provision as appears in this case to the effect that it may be presumed that the jury was sworn, it is very generally held that the record must affirmatively show that the jury was sworn; and if it does not, the conviction must be reversed.

Labor organization — expulsion of member — review. The expulsion of a member of a labor organization for infringement of rules, in accordance with the constitution of the order, is held not reviewable in the courts in the Massachusetts case of Shinsky v. Tracey, 114 N. E. 957, annotated in 1917C, 1053.

Limitation of actions — claim against physician for malpractice — when runs. The Statute of Limitations, it is held in the Maryland case of Hahn v. Claybrook, 100 Atl. 83, begins to run against a cause of action against a physician for negligence in prescribing a drug which causes discoloration of the plaintiff's skin when sufficient discoloration appears to put him upon notice and inquiry as to the injury and not at the time the discoloration reaches its height and becomes permanently fixed.

Supplemental annotation accompanies this decision in L.R.A.1917C, 1169.

Malicious prosecution — conviction secured by perjury — probable cause. A nisi prius conviction secured by perjury of complaining witness who is defendant in the action for malicious prosecution, in pursuance of fraud and conspiracy, and reversed on appeal, is held not evidence of probable cause in an action for malicious prosecution in Desmond v. Fawcett, 226 Mass. 100, 115 N. E. 280, L.R.A.1917D, 408.

Master and servant — injury to child — applicability of Workmen's Compensation Act. Since the hiring of a child contrary to the provisions of a statute, is invalid, the provisions of the Workmen's Compensation Act, which apply only to valid employment contracts, do not, it is held in the New Jersey case of Hetzel v. Wasson Piston Ring Co. 98 Atl. 306, L.R.A.1917D, 75, prevent the maintenance of a common-law action for his negligent injury, whether the contract was made by himself or his parent.

Master and servant — workmen's compensation — disease. Exhaustion followed by pneumonia and death is held not a personal injury within the meaning of the Workmen's Compensation Act, in Linnane v. Ætna Brewing Co. 91 Conn. 158, 99 Atl. 507, L.R.A.1917D, 77, although caused to the fireman of a stationary engine by his being called in the night to take the place of another prevented from reporting by a heavy snowstorm, his making his way to the place of employment through the drifts, which wet his clothing, and working many hours without change of garments at labor which required his alternating between the heat of the boiler room and the outdoor cold.

Master and servant — workmen's compensation — injury while going home from work. Injury to a member of a railroad construction gang by being struck by a train while walking a half hour, after quitting work for the day, along the railroad track to the bunk house provided by his employer for his use, when a safe highway was available for the purpose, is held not to arise out of or in the course of his employment, within the meaning of the Workmen's Compensation Act, in Guastelo v. Michigan C. R. Co. — Mich. —, 160 N. W. 484, L.R.A.1917D, 69, if this duty terminated at quitting time and he lived at the bunk house merely for his own convenience.

Master and servant — Workmen's Compensation Act — death from heart failure. Heart failure causing death of a watchman with a weak heart, which is due to his exertion and excitement in performing his duty to give an alarm of fire, is held in Michigan case of Schroetke v. Jackson-Church Co. 160 N. W. 383, L.R.A.1917D, 64, to be within a Workmen's Compensation Act providing compensation for death by accident in the course of employment.

Mechanics' lien — cultivating land. That no lien for cultivating and caring for an orchard which substantially enhances the value of the land can be secured under a statute giving a lien to any person who clears, grades, fills in, or otherwise improves real property, is held in the Washington case of Howe v. Myers, 162 Pac. 1000.

The right to mechanics' liens for cultivation, care, or improvement of soil or beautifying premises generally is treated in the note appended to the foregoing decision in L.R.A.1917D, 349.

In holding that a lien for cultivating and caring for an orchard cannot be sustained under a statute creating a lien for clearing, grading, filling or otherwise improving real property at the request of the owner, the court in the foregoing decision, distinguishes cases sustaining or recognizing liens for "planting

a vineyard," "planting trees, shrubs, and flowers," "planting an apple orchard," or "breaking and reducing wild lands to cultivation," for the reason that in such cases the labor amounts to a connected and completed operation, while work in cultivating and caring for an orchard is more or less intermittent, disconnected, and seasonal; and the lien statute under consideration did not refer to intermittent or disconnected operations.

Municipal corporation — employment of attorney. A municipal corporation whose charter is silent in the premises is held to have implied authority to employ an attorney to attend to its corporate interests, and to prosecute and defend actions in its behalf, in Cheesebrew v. Pt. Pleasant, 71 W. Va. 199, 76 S. E. 424, 79 S. E. 350, annotated in L.R.A.1917D, 237.

Negligence — leaving explosive under surface of street. Independent contractors for a street improvement who when turning over the complete job leave an unexploded charge of dynamite under the surface of the street are held liable in Wilton v. Spokane, 73 Wash. 619, 132 Pac. 404, L.R.A.1917D, 234, for injury to an employee of an electric company, by its explosion when he strikes it in setting poles.

Negligence — swinging door — frightening horse. A gas company which maintains on its line a small meter-house 50 feet from a highway from which it is separated by a board fence is held not liable in United Fuel Gas Co. v. Williamson, 174 Ky. 362, 192 S. W. 18, L.R.A.1917D, 197, for injury to one thrown from his mule when it is frightened by the swinging of the unfastened door of the house.

Notary public — power to appoint women. The legislature, it is held in the New Hampshire case of Re Opinion of Justices, 99 Atl. 999, L.R.A.1917D, 286, may, where the Constitution empowers it to provide for the naming of all civil officers except those provided for by the Constitution, authorize the appointment of women as notaries public where that office is not provided for by the Constitution, although at common law women could not fill it.

Nuisance — property on street car track — destruction — liability. A street railway company is held liable in Ohio Valley Electric R. Co. v. Scott, 172 Ky. 183, 189 S.W.7, annotated in L.R.A. 1917C, 1038, for destroying a cottage deposited by a flood upon its tracks so as to obstruct passage, if it could have been moved off in little more time than its destruction required.

Sometimes the extent of the injury will depend upon the degree of care exercised by the one abating the nuisance. In such cases it is usually held that ordinary care is all that is required, and where the emergency is great it has been held that the abater is not liable unless the injury was caused by gross negligence or wilful destruction. The court in the foregoing decision takes this position.

One who, in summarily abating a nuisance, commits a breach of the peace, is usually held liable in damages. This is not because unnecessary injury is done to the property, but because the courts make an exception to the general rule that a private person may abate a nuisance.

One who, in exercising the common-law right of abating a nuisance, goes farther than is necessary, causing unnecessary injury to the property that is causing the nuisance, is held liable in damages in numerous cases.

Office — incompatibility. Incompatibility between offices is an inconsistency between the functions thereof, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both. So, it is held that the office of member of the city board of education and clerk thereof are incompatible in the New Mexico case of Haymaker v. State, 163 Pac. 248, L.R.A. 1917D, 210.

Physician — liability for disclosing confidential information. A physician is held not liable in the Washington case of Smith v. Driscoll, 162 Pac. 572, L.R.A.1917C, 1128, in damages for disclosing on the witness stand information gained while in professional attendance on a patient if the testimony was admissible in the case in which it was given and was relevant and pertinent to the issues or was admitted by the court over objections made to its admissibility. This seems to be a case of first impression.

Public utilities — what constitutes — private electric company selling surplus energy. A manufacturing company, although generating electricity primarily for its own use and selling only its surplus energy, within a limited portion of a city, to customers over their own wires and poles, and although not having a franchise to operate as an electric utility, and not using the streets and public places of the city, is nevertheless an electric utility within the meaning of the Missouri statutes, so as to subject it to the jurisdiction of the Commission upon the complaint of a consumer whose service has been discontinued, it is held in the Missouri Case of Roach v. Danciger, P.U.R.1917C, 144.

Railroads — smoke and noise — jurisdiction of Commission. The Pennsylvania Public Service Commission has no power to order a railroad company to abate unnecessary smoke and noise in the operation of railroad locomotives to the annoyance of citizens residing in the vicinity of a station and tracks, it is held in the Pennsylvania Case of Delong v. Lehigh Valley R. Co. P.U.R. 1917B, 982.

Rates — railroads — baggage storage. That a twenty-four hour "free limit" for the storage of baggage is not unreasonable is held in the Wisconsin Case of United Commercial Travelers v. Chicago, M. & St. P. R. Co. P.U.R. 1917C, 82.

A rule permitting railroad companies to charge for the storage of baggage held over Sundays and legal holidays is unreasonable.

Rates — railroads — mileage books. The great advantage of mileage over ordinary tickets, in the saving of time in buying tickets at crowded stations and the resultant greater ease in handling baggage, justifies their issuance, it is held in the Wisconsin case. Ibid, although there is no saving in the fare.

Receiver — for business of foreign corporation. That a receiver may be appointed to wind up the business which a foreign corporation conducts within the state, although no domiciliary receiver has been appointed is held in Low v. R. P. K. Pressed Metal Co. 91 Conn. 91, 99 Atl. 1, annotated in L.R.A.1917D, 291.

Reparation — set-off — electric service to distinct property. That an undercharge for electricity furnished to one property cannot be imposed as a set-off in a proceeding to recover an overcharge for service furnished a separate and distinct property is held in the Pennsylvania case of Whitcomb v. Duquesne Light Co. P.U.R.1917B, 979, although both premises are occupied by the same person.

Rescission — of Sunday contracts. That the court will not rescind a contract of sale because made on Sunday contrary to statute, nor direct a return of the purchase money, is held in Bertram v. Morgan, 173 Ky. 655, 191 S. W. 317, annotated in L.R.A.1917D, 445.

Return — reasonableness — value of service. Rates are unreasonably high, although the utility is not receiving a fair rate of interest on its investment, where they exceed the value of the service, it is held in the Oregon case of Canyon City v. Consolidated Electric Light Co. P.U.R. 1917C, 162, and, therefore, lower rates, under such circumstances, are liable to yield a greater return upon the fair value of the property.

Sale — warranty — representation as to capacity of machine. A statement by a vendor of a haystacker to induce a prospective customer to exchange a machine in use by him for the vendor's machine, that the latter would stack hay at a certain amount per ton cheaper than the old one, is held mere sale talk, and not a warranty in Carver-Shadbolt Co. v. Loch, 87 Wash. 453, 151 Pac. 787, annotated in L.R.A.1917C, 1076.

Service — continuous — limiting hours of service. That twenty-four hour service is required of a public utility under a rate schedule containing no statement limiting the hours of service is held in Smith v. De Tienne, 4 Mo. P. S. C. R. 509, P.U.R.1917C, 24.

Service — discontinuance — necessity of notice. An electric company is held not obligated to disconnect service or remit service charges for a school during the vacation period in Re Springfield Bd. of Edu. 4 Mo. P. S. C. R. 540, P.U.R.1917C, 33, without notice from the school authorities to discontinue.

Service — jurisdiction of commission — discontinuance of service — municipal franchise. That the New York Commission, Second District, has power to relieve a street railway from the necessity of complying with a municipal franchise obligation requiring operation of street cars during the winter months is held in the case of Re Freeport R. Co. P.U.R.1917C, 155.

It is also held in this case that a case of imperative necessity for immediate relief must be clearly shown to exist before the New York Commission, Second District, will exercise its discretionary power to relieve a utility of its franchise obligations when such relief has been refused by the municipal authorities.

Service — railroads — switch or side track for private use. The fact that a shipper agrees to assume the expense necessary to grade, drain, and ballast the roadbed of a proposed switch or sidetrack, is held in the Pennsylvania case of Main Line Stone Co. v. Philadelphia & W. R. Co. P.U.R.1917C, 70, not to alter the rule that a railroad company cannot be compelled to construct such a facility on its own ground for the use of an individual shipper.

Slander — charging crime — intent. That one cannot escape liability in damages for stating that another is a thief, and his office a thief's den, by showing that he intended the words merely as abuse, without any intent to charge the commission of crime is held in Shepard v. Brewer, 248 Mo. 133, 154 S. W. 116, annotated in L.R.A.1917D, 199.

Words otherwise actionable per se are not actionable where they were used and understood as mere terms of abuse. This is not contrary to the opinion in the foregoing case, as in that case the intent to use the language only in an abusive sense was secret.

Specific performance — of contract to appraise premises. Specific performance, it is held in Mutual L. Ins. Co. v. Stephens, 214 N. Y. 488, 108 N. E. 856, annotated in L.R.A.1917C, 809, cannot be enforced of a provision in a lease for the appraisal of the value of the premises with a view to enable the lessee to exercise his option to purchase.

Street railway — failure to look — contributory negligence. The court, it is held in Manos v. Detroit United R. Co. 168 Mich. 155, 130 N. W. 664, must direct a verdict against one who steps upon a street car track where there is an unobstructed view, without looking for a car immediately before doing so, and is injured, although he believed, from knowledge gained when he last looked, that he could cross in safety.

The cases on attempt to cross in front of an observed street car as contributory negligence are gathered in an extensive note appended to this decision in L.R.A. 1917C, 689.

Street railways — injury to intoxicated person — liability. That one who voluntarily becomes intoxicated and lies down on a street railway track cannot hold the railway company liable for injury inflicted upon him by its car unless the car operator was guilty of actionable negligence after discovering his peril, is held in Dickson v. Chattanooga R. & Light Co. 237 Fed. 352, L.R.A.1917C, 464.

Toll road — exclusive rights. A charter to a turnpike company for the construction of a toll road, which does not make the right exclusive, is held in the Maryland case of Hagerstown & C. Turnp. Co. v. Evers, 99 Atl. 980, annotated in L.R.A.1917D, 333, will not support an injunction to prevent the construction of a road to enable persons formerly using the toll road to reach free county highways.

This decision is in accord with the weight of authority. It is now well established that the charter of a toll road or turnpike company which grants merely the right to construct a road between certain points and to collect tolls, and is not in its terms exclusive, will not be construed as exclusive, so

as to entitle the company to enjoin, or maintain an action for damages for, the subsequent establishment of free public roads, or of other toll roads demanded by the public convenience and necessity, and not intended merely to evade the payment of toll on the road previously established, although the opening of the new road, by diverting travel, will greatly diminish or even destroy the franchise value of the existing road.

Trademark — name of celebrity. The word "Rameses" is a proper trademark for a brand of cigarettes, and is held infringed by the use of the word "Radames" for a similar purpose in Stephano Bros. v. Stamatopoulos, 238 Fed. 89, annotated in L.R.A.1917C, 1157.

Valuation — water rights — capitalization of saving over steam. That water rights are not necessarily to be valued by capitalizing the saving over steam power, is held in the Illinois case of Re Montgomery Hydroelectric Co. P.U.R.1917C, 224, since the consumers may be entitled to some of the advantages of their favorable location.

Water — river out of channel — protection of land — liability. One who, to protect his land from being submerged by the water of a river which has left its channel, to which it cannot be restored, and which is gradually forming a lake upon lowland lying adjacent to it, deepens an outlet which the water has formed, is not, it is held in the California case of Jones v. California Development Co. 160 Pac. 823, L.R.A. 1917C, 1021, if his act is not unreasonable under the circumstances, liable for injury caused to submerged land by the rapid withdrawal of the water standing on it because of the deepened outlet.

As practical as the point here presented seems to be, no case in addition has been found which squarely passes upon the right of a private landowner to deepen a natural channel so as to protect against an overflow therefrom upon and the flooding of his land, by so increasing the capacity of the waterway that it will carry waters which otherwise would so overflow.

Will — holographic — defective date. Under a statute requiring a holographic will to be dated by testator, a will which, being made in 1910, states that it was subscribed on a certain day of a certain month in the year "one thousand," is held invalid in the California case of Re Vance, 162 Pac. 103, L.R.A.1917C, 479.

Will — legacy — store — what passes. The legacy of a drug store, under the Civil Code of Louisiana (articles 480, 1642), is held not to include the money, rights, and credits of the concern in Re Sauvage, 140 La. 619, 73 So. 702, annotated in L.R.A.1917D, 426, and does not make the legatee liable for the debts contracted in the course of its business.

Recent English Decisions

[Note.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.]

Collision — total loss — measure of damages. The measure of damages in the case of the total loss by collision of a vessel under charter is the value of the vessel at the time of her loss plus the proper sum for freights or profits at the end of the voyages fixed by her existing charters, subject to proper deduction for contingencies and wear and tear, according to a decision of the English Court of Appeal in The Philadelphia, L. R. [1917] Prob. 101, in which the English cases on the question are discussed at some length.

Constitutional law — internment of naturalized citizen — validity. Although should the question arise in this country of the right of the Federal government, in the exercise of its power to carry on war, to intern those of its citizens whose activities may have exposed them to suspicion though not to conviction, it would take a rather different

form than that before the English House of Lords in Rex v. Halliday [1917] A. C. 260, fundamentally it would be the same; namely, whether the sovereign power of the state to preserve itself transcends the constitutional guaranty of the rights of the citizen. In the case referred to it was held that under the powers conferred by the Defense of the Realm Act of 1914 upon the King in Council "to issue regulations for securing the public safety and the defense of the realm" a regulation empowering the Secretary of State to order the internment of any person "of hostile origin or association" where, on the recommendation of the competent naval or military authority, it appears to him expedient for securing the public safety or defense of the realm, was not ultra vires as to a naturalized British subject of German birth; and therefore that such a person, upon being interned, was not entitled to a writ of habeas corpus.

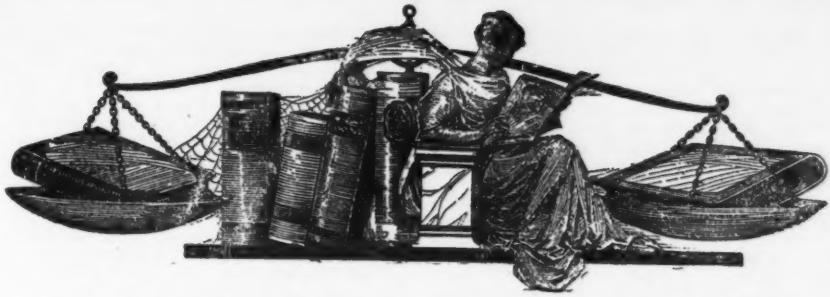
Husband and wife — husband's liability for wife's tort. The liability of the husband for his wife's tort does not render him liable for an injury sustained by a servant in her employ, such liability not extending to torts arising out of the wife's contract. Cole v. De Trafford [1917] 1 K. B. 911.

Insurance — fire — exception from liability for loss resulting from military power. That the exception in a fire insurance policy of damage "resulting from insurrection, riot, civil commotion, or military or usurped power" is not limited to damage resulting from internal incidents, but embraces losses occasioned by the exercise of foreign military power, is held in Rogers v. Whittaker [1917] 1 K. B. 942, a case arising out of the destruction of plaintiff's premises by an incendiary bomb dropped from a Zeppelin.

Interest — right of holder failing to present debenture for payment when due. Where the registered debenture of a company does not contain any provision appointing a particular place for payment, it is the duty of the company to seek the debenture holder if he is within the realm and make legal tender of the money on the due date without request; and in a case where no such legal tender has been made, the holder of such a debenture who, from oversight, carelessness, or other cause has neglected to present his debenture for payment off on the due date, can recover from the company interest on the principal money thereby secured down to the date of actual payment. Fowler v. Midland Electric Corp. [1917] 1 Ch. 656.

Libel and slander — privileged occasion — excess of privilege. Where a libel contains defamatory matter not referable to the duty or interest which gives rise to the privileged occasion, such matter is outside the occasion and is not protected; and such excess of privilege in part of a defamatory publication may also be evidence of malice as to the whole of it. Excessive language in regard to a matter within the privileged occasion is material only as evidence of malice, and, it seems, in determining whether such language is evidence of malice it will not be subjected to strict scrutiny. Adam v. Ward [1917] A. C. 309.

War — effect on partnership — right of enemy partner to share of profits. The English Court of Appeal has held in Hugh Stevenson & Sons v. Aktiengesellschaft för Cartonnogen-Industrie [1917] 1 K. B. 842, reversing [1916] 1 K. B. 763, W. N. 76, 85 L. J. K. B. N. S. 847, 114 L. T. N. S. 180, 32 Times L. R. 299, that although a partnership is dissolved by war between the countries of the respective partners, the British partner has in such case no right which he would not otherwise have had to buy his late partner's share at a valuation, and that the enemy partner is therefore entitled to a share of the profits made after the dissolution by the British partner in carrying on the business with the aid of the enemy partner's share of the capital.



New Books and Periodicals

As great a store
Have we of books as bees of herbs, or more.—Vaughan.

"Legal Reasoning and Briefing." By Jesse F. Brumbaugh. (The Bobbs-Merrill Co., Indianapolis, Ind.) $5.00.

This is a book of real interest to the legal profession. The author had several years' experience in training students in the art of public speaking and argumentation and later taught logic, brief drawing, and common-law pleading. It seemed to him that the practitioner needed a more thorough understanding of the principles of logic and argumentation in relation to the practice of law than is acquired in the cursory study of rhetoric and argumentation as taught in the higher schools. This work is designed to supply a distinctly professional treatment of these subjects from a legal point of view.

There is hardly any lawyer who feels entirely satisfied with his court-room work. Many a man who knows the law well fails to apply it to the best advantage in the trial of cases. This volume is full of practical suggestions, directions, and advice as to how to prepare and deliver an argument to the court or a speech to the jury, how to examine the different classes of witnesses, how to prepare briefs of all kinds, including briefs on appeal. Some long-practised but heretofore unsystematized principles and methods are here more formally presented and elaborately illustrated by specimen briefs of actual cases prepared and argued before the courts.

We believe that Mr. Brumbaugh's book will be cordially received by the profession.

"Modern Business Corporations." By William Allen Wood, LL.M. (The Bobbs-Merrill Company, Indianapolis, Ind.) Second Edition. $4.00.

This is a new edition of Mr. Wood's valuable book on the promotion, organization, financing, and management of corporations. The work was prepared as a ready reference manual of the substantive law of corporations with the procedure in their incorporation and administration, for the use of officers, directors, stockholders, and counsel. The favorable reception of the earlier edition by those for whom it was prepared, and its use by investors and accountants and in many universities, have led to the preparation of this revised and enlarged edition.

The author has added a discussion of the principles of taxation with particular reference to corporations. He reviews the theories under which corporations are taxed, shows the effect of many current practices, and offers suggestions from which one may judge whether he is properly taxed.

Several new forms and the Federal laws under which corporations are regulated and taxed have been added to this edition. The volume will be found very useful.

"Leading Cases on International Law." By Lawrence B. Evans, Ph. D. (Callaghan and Company, Chicago, 1917.) $3.50.

Professor Lawrence B. Evans has confined his selection of cases on international law, in his recently published book, to decisions from American and British jurisdictions, for the reason that, as stated in the preface, "the decisions of courts outside of common-law jurisdictions are usually not cast in such form as to make them useful to students" and it was desired to make the collection brief.

Confining himself to these sources of authority, he has not included in this collection any of the international cases which have been decided by the tribunals constituted in accordance with the provisions of The Hague Conventions for the Pacific Settlement of International Disputes, which cases involved questions which neither party would have been satisfied to have submitted to the courts of the other for decision. References are furnished, however, in the supplementary notes, to Professor George Grafton Wilson's compilation on The Hague Arbitration Cases, which was published in 1915, and also to The Hague Reports, edited by Dr. James Brown Scott, which was published by the Carnegie Endowment of International Peace in 1916.

As is inevitable in a collection of cases from the aforesaid sources, the cases decided prior

to 1900 have been included in the case books previously published on this subject; but about 30 per cent of the decisions in the collection have been recently handed down and do not appear in the earlier case books, although extracts from some of them appear in the International Cases recently published by Professors Stowell and Munro of Columbia University.

Among the more recently decided cases which appear in this collection are the American Banana Company v. United Fruit Co., in which it was decided that the so-called Sherman Act could not be applied to American corporations when the acts complained of were performed outside of territory of the United States; Louisiana v. Mississippi, involving jurisdiction over boundary rivers; Maryland v. West Virginia, deciding their boundary dispute; the Philippine Sugar Cases; the Charlton Extradition Case; and cases arising from the present European War, such as The Derfflinger, The Miramichi, The Southfield, The Odessa, The Zamora (privy council), The Kim, The Appam (district court), and others.

The devisions and subdivisions under which the decisions are grouped follow in the main the grouping in previous case books, except that the subdivisions are more numerous. In some respects this is advantageous, but owing to the different principles involved occasionally in a single case, it is difficult to determine in some instances the particular subheading under which a decision should be listed. For example, the Zamora appears under the subheading, "Prize courts," of the general heading, "War Rights as to Private Property," whereas this decision has an equally important bearing upon the questions discussed under the heading, "The Relation of International Law to Municipal Law." Again, the United States Supreme Court decision in the Charlton Extradition Case appears under the heading, "Treaties and Conventions," because it interprets the extradition treaty between the United States and Italy, but it would also have been appropriate to list it under the subsequent heading, "Extradition." This difficulty, if it should prove to be one in consulting this book for reference purposes, can readily be overcome in the next edition by inserting cross references.

Professor Evans has appended to the end of each subdivision notes containing references to other cases in which the same principles have been involved, and also references to the authoritative international publications of America, Great Britain, and the continental countries. These notes are exceedingly well prepared and furnish original contributions of great value. The cases cited in the notes number about eight hundred, and in addition there are more than two hundred references to books dealing with international law subjects and consisting for the most part of monographs on special topics. Professor Evans does not claim that in either case the list is exhaustive, but taken in connection with his more general references to the classic commentaries and to the many recent treatises on international law, it will be found that very little of importance antedating this publication has been omitted.

The student of international law will find this collection of cases most comprehensive and useful in studying the subject, and although the collection apparently was intended primarily for the use of the student, the notes above mentioned make it a valuable and convenient reference volume for the practitioner as well.

Chandler P. Anderson.

Recent Articles of Interest to Lawyers

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"Commercial Arbitration in England."—10 Maine Law Review, 230.

"The Difference Between Arbiter in the Roman Sense and Modern Arbitrators."—65 University of Pennsylvania Law Review, 732.

Assignment for Creditor.

"Validity of Assignment for Benefit of Creditors under Virginia Bulk Sales Act."—3 Virginia Law Register (N. S.) 170.

Attorneys.

"Efficiency in Law Office Organization."—28 American Legal News, 5.

"The Lawyer and the Public."—28 American Legal News, 11.

"How a Young Lawyer Can Attain Success.—28 American Legal News, 19.

Business.

"Modern Business Organizations."—24 Case and Comment, 184.

Codification.

"Precedent v. Codification."—24 Case and Comment, 175.

Common Law.

"Precedent v. Codification."—24 Case and Comment, 175.

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"Failure to Support as an Independent Ground for Divorce."—24 Case and Comment, 208.
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"Duress as a Defense in Criminal Cases."—21 Dickinson Law Review, 257.
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"The New Law of Nations,"—15 Michigan Law Review, 631.
Jury (Address to).
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Legal Clinics.
"Legal Clinics—The Student's Point of View."—24 Case and Comment, 214.
Limitation of Actions.
"A Statute of Limitation for Taxes."—3 Virginia Law Register (N. S.) 161.
"Effect of Action Terminated Without Decision on the Merits as Extending Limitations."—12 Bench and Bar, 55.
Monopoly.
"Price Maintenance."—24 Case and Comment, 193.
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"The Essentials of a Municipal Budget."—1 New Jersey Municipalities, 5.
"Introducing Mr. Walter R. Darby, Commissioner of Municipal Accounts for the State of New Jersey."—1 New Jersey Municipalities, 9.
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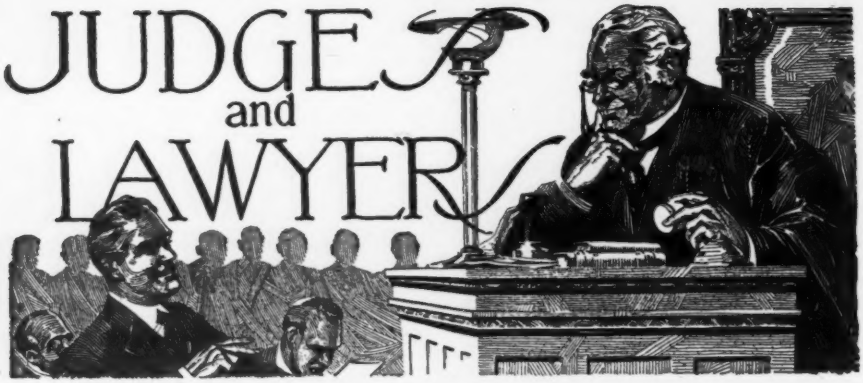
"The Uniform Limited Partnership Act."—65 University of Pennsylvania Law Review, 715.
Porto Rico.
"The Establishment of Civil Government in Porto Rico."—5 California Law Review, 361.
Presidential Electors.
"The Electoral College and Presidential Suffrage."—65 University of Pennsylvania Law Review, 737.
Roman Law.
"The Difference Between Arbiter in the Roman Sense and Modern Arbitrators."—65 University of Pennsylvania Law Review, 732.
Sale.
"Some Reasons Why the Code States Should Adopt the Uniform Sales Act."—5 California Law Review, 400.
Taxes.
"Double Inheritance Tax Avoided."—10 Maine Law Review, 217.
See also Limitation of Actions.
Trusts.
"Modern Business Organization."—24 Case and Comment, 184.
"Trusts—Express and Implied."—10 Maine Law Review, 224.
Uniform Legislation.
"Some Reasons Why the Code States Should Adopt the Uniform Sales Act."—5 California Law Review, 400.
Wills.
"The Execution of Wills in California."—5 California Law Review, 377.
Witness.
"The Medical Expert."—24 Case and Comment, 191.
Workmen's Compensation.
"British Workmen's Compensation Law—The Amount of Compensation."—85 Central Law Journal, 4.
"Litigation Under Workmen's Compensation Law."—24 Case and Comment, 187.



A Record of Bench and Bar

Hon. Albert Russell Savage

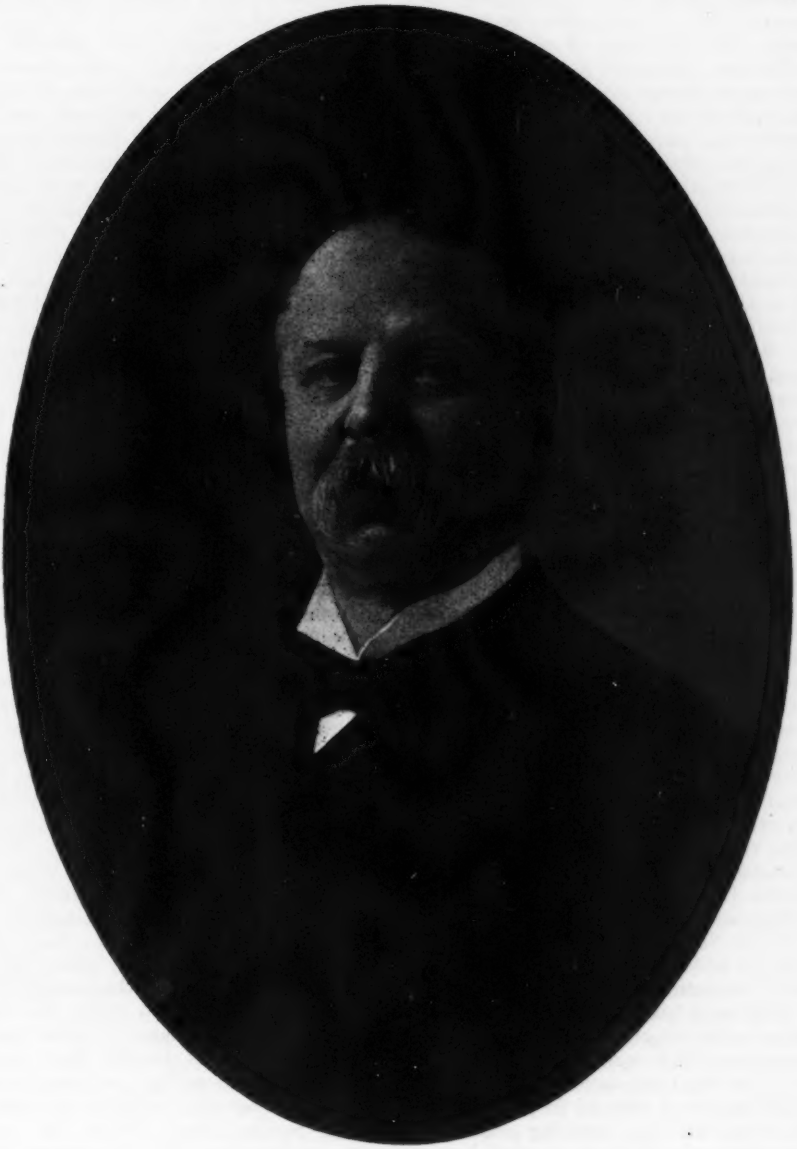
Late Chief Justice of the Supreme Judicial Court of Maine

WE are privileged to make the following extracts from the response of the court delivered by Chief Justice Cornish of the Supreme Judicial Court of Maine at the special session of the law court held in honor of the memory of the late Chief Justice Savage of Auburn. Said Chief Justice Cornish:

"Chief Justice Savage, in whose loved memory we are met to-day, stepped so suddenly from the chamber we call life into the chamber we call death, which we believe is but another room in the house of the good Father, that he almost seems not to have left us, and it is with difficulty that we can realize his departure. He had returned to his home in Auburn on Monday, June 11th, from the law court in Bangor, where he had seemed as well as at any time during the past three years, and had presided over the sessions of that court with his accustomed grace and dignity. On Tuesday and Wednesday he was busy with his judicial work, hearing causes in chambers, and preparing an extended note in a case pending in the law court where there had been a divergence of views. On the day before he passed away he wrote out in his own clear and beautiful hand a decision in a matter that he had recently heard, dated it the following day, Thursday, June 14, and left it on his desk awaiting his return next morning. But next morning, instead of returning to the courthouse and to his chambers, which by long association had become so dear to him, without warning, without pain, his spirit took its flight from the burdening body, and after many years of honorable and honored labor he was at rest.

"Chief Justice Savage was truly a product of northern New England. Born in Vermont, educated in New Hampshire, his life work developed and completed in Maine, he was the very embodiment of the characteristics of our northern country. Towering and majestic like its mountains, placid and equable like its lakes, with a depth of reserved power like its noble rivers, his nature could and did drink in the joys and the pleasures of a verdured June, or submit in silent strength and resignation to the sorrows and disappointments of a bleak and drear November. His birthplace was Ryegate, Vermont.

"Judge Savage was born on December 8, 1847. His father was a farmer, and there, in that remote rural community, the boy grew up amid all those typical surroundings, which may then have seemed to him like privations, but which in reality were rich blessings. Industry,



HON. ALBERT RUSSELL SAVAGE.

prudence, thrift, rational ambition, and patience, these constituted the environment. He was fond of recounting his early days upon the farm and looked back upon them with an appreciation of their formative value. His college was Dartmouth, an institution which has given three chief justices to Maine.

"During his college course and after graduation he taught in northern New Hampshire an dnorthern Vermont; and as we journeyed together from Montreal to Portland a few years ago, he pointed out to me, in a reminiscent mood, one of the districts in which he had taught while in college. He then studied law and was admitted to the bar of Androscoggin county at the April term, 1875, and for more than forty-two years he upheld the best traditions of that bar and of the profession. As a practising attorney from 1875 to 1897, a period of twenty-two years, his rise from rather small beginnings was constant, until he was recognized as one of the leaders of the bar in the state. Those present here to-day who were his associates or his adversaries in many a hard-fought battle know full well the skill and the strength of his honorable warfare. Amid his many professional cares, however, he found time to serve in varied positions of public trust, in all of which he proved his capacity for administrative and judicial labor, while at the same time his own experience was broadening and his intellectual equipment was developing.

"During this period, too, he prepared, and, on January 1, 1897, he published, the first volume of his Index Digest of the Maine Reports, a task that consumed the hours which others were devoting to rest or recreation, and thereby he made the profession his acknowledged debtor. It was a work which proved the analytical qualities of his mind, and greatly enhanced his legal reputation. . . .

"The dominant element in Judge Savage's character was untiring industry. Voltaire's motto, 'Always at work,' was his. He had the capacity for unremitting mental labor, and he exercised that capacity to the full. 'Nulla dies sine linea.' Physically he was inclined to be indolent, mentally he was ever active, and herein lay the source of his strength. Each year brought growth in legal knowledge and intellectual power, as the giant oak acquires each twelve months its circle of added fibre. In his chambers, he was always busy, and when the day's work was finished and his books and his pen laid aside, he would devote hours to the solution of an intricate picture puzzle, or commit to memory a page of his favorite Shakespeare. During the last years of his life he mastered several of the plays of the great dramatist, and could recite them verbatim, a task of magnitude. On his desk, right at hand, he always kept the well-thumbed volume.

"In 1909 he brought out his supplemental index digest, finding time therefor amid his exacting judicial labors.

"To this talent for work, which is but another name for genius, we must add an open mind and an innate love of justice. If he had prejudices, he concealed them. I doubt if he possessed any. His single thought was to discover the way the light of legal truth leadeth. And so, with this legal mind constantly in training, his strength waxed with the years, and he advanced by steady strides into the ranks of Maine's great judges.

"At nisi prius he was welcome in every county. He was popular in the only true and desirable sense, in that popularity with him was a result, and not a motive. He presided over the trial of a cause before a jury with ease and grace and dignity. He spoke infrequently. His words had therefore the greater weight. With his full mind he was able to rule promptly and squarely, thus expediting the cause, while always giving the aggrieved party his right of exception. He never feared exceptions. I have often heard him say that he was glad when exceptions were taken to a doubtful ruling, because if it was wrong he wished it to be made right. His charges to the jury were simple, clear, informing, not essays on abstract law, but plain talks to plain men on the issues before them. He was master of the situation. He looked the part and he acted the part. He was free from all exhibitions of temper. He never seemed to be irritated himself, and he never irritated others. I never in my life, saw any signs of anger in him. He was patient, kindly, courteous; yet there

was an underlying firmness which, though not obtrusive, was silently manifest. It was felt, rather than seen. In his personal relations the same was true. There was a feeling of friendship, but somehow, except to a chosen few, it stopped just short of familiarity. . . .

"He sat with nineteen different judges in the law court, beginning as a junior with Chief Justice Peters. His first published opinion was Rhoades v. Cotton, announced only one month after his appointment, and appearing in 90 Me. 453, 38 Atl. 367. His last was State v. Jenness, announced only a week before his death. This will appear in 116 Me. —, 100 Atl. 933. Twenty-seven volumes therefore contain the result of his appellate work. They aggregate 434 full opinions, in addition to 63 per curiam rescripts, a total of nearly five hundred decisions, representing his contribution to the jurisprudence of our state. . . .

"Judge Savage had a singularly happy style. He developed his opinions so logically and so lucidly that they marched straight on to the conclusion, and they were easy reading even for a layman. His pen ran smoothly. He sought no display of learning, but the learning was disguised in terms of everyday understanding. He was fond of short sentences. He often made his points in sharp succession. He hit the nail with every blow and the wood was left unscarred. This was especially true of his later opinions, in some of which the use of conjunctions is almost dispensed with, and no verb is far separated from its nominative. He did not seek the startling expression, and yet, sometimes he bordered on the epigrammatic. In one of his last opinions, Bixler v. Wright, 116 Me. 133, 100 Atl. 467, a case involving fraud in the sale of goods, we find these words, which are characteristic not only of his literary style, but of the man himself: 'The law dislikes negligence. It seeks properly to make the enforcement of men's rights depend in very considerable degree upon whether they have been negligent in conserving and protecting their rights. But the law abhors fraud. And when it comes to an issue whether fraud shall prevail or negligence, it would seem that a court of justice is quite as much bound to stamp out fraud, as it is to foster reasonable care.' . . .

"I cannot close without a brief reference to the personal appearance of Judge Savage, so familiar to us, but unknown to those who may read these words in after years. Of commanding height, with a fully developed and well-rounded figure, and an upright carriage, he was indeed a king among men. Whenever and wherever he represented the court we were proud of him. His figure was imposing and his countenance strong and fine. He was moderate in movement, moderate, too, in speech. His voice once heard could never be forgotten. It was deep and rich as a cathedral bell, with a peculiarly sympathetic quality that was most charming. It attracted and held attention. Usually reserved and dignified, yet when that kindly smile illumined his face you were made an instant friend. He loved companionship and the society of congenial associates. He was a welcome visitor at the fireside, and after an evening's talk before the open fire one was impressed with the sweetness as well as the strength of his character. He was singularly modest. Publicity he disliked and avoided. He met with personal bereavements in the loss of family far beyond the lot of any man within my acquaintance, but no one ever heard him utter a word of complaint. With him tribulation indeed worked patience. It softened him and made him tender."

Judge George C. Wing, chairman of the committee on resolutions, presented the following tribute to the memory of Judge Savage:

Resolved, that the members of the Androscoggin Bar Association wish to express their great appreciation of the character and service of Albert Russell Savage, for many years a member of its association and of this court, and to offer this loving tribute to his memory to the end that the same may be placed upon its records, and made permanent.

Resolved, that during his entire career as a member of the bar in every place to which he was called for public service he showed himself trustworthy and deserving of the great honors which he en-

joyed. He was kind. He was patient. He was learned, and best of all he was loyal to his friends. He believed in fair dealing, and that every suitor should have a fair hearing and his contention properly considered. He was painstaking and impartial and approached every question with an open mind. He earned and deserved his reputation for courage, justice, learning, and fairness, and wherever and whenever he rendered service a sense of security prevailed. He died in his full intellectual strength. We sit in the shadow and mourn his loss, for we loved him, and he is no longer with us.

Resolved, that these resolutions be presented to the court with the request that they be entered upon its records and that a copy thereof be transmitted to his widow, who survives him.

George C. Wing,
Jesse M. Libby,
Harry Manser,
Dana S. Williams,
Harrie L. Webber,
Committee on Resolutions.

Former Chief Justice William P. Whitehouse, in an eloquent tribute to his former associate on the supreme bench, said in part:

"Although Judge Savage never aspired to fame as a raconteur, or appeared to take special pride in the brilliancy of his wit in repartee, he recognized the fact that humor is a quality of the imagination indispensable to a correct view of proportion, and was himself possessed of a keen but always gentle and kindly sense of humor. I recall an instance of it in the supreme court at Auburn, a short time before his appointment to the bench. Mr. H. called up a bill for the dissolution of a partnership in which Counselor Savage was for the defense. Several grounds for the dissolution were stated in such general terms that it was difficult to discern the one relied upon. But the plaintiff's principal grievance appeared to be that he had not received the large profits from the business that he had anticipated. It soon appeared from evidence that the plaintiff had never contributed anything to the capital, or any service to the business, of the company.

"The presiding justice had just finished the hearing of a libel for divorce for desertion and cruel and abusive treatment, and, with a twinkle in his eye, said to Mr. H.: Upon what ground do you claim a divorce in this business partnership,—is it desertion, or cruel and abusive treatment? Before Mr. H. could explain, Counselor Savage promptly responded: 'As I understand it, your Honor, it is simply a case of failure to support the plaintiff.' Hazlitt somewhere says that 'ridicule is the test of truth, and that false gods are laughed off their pedestals.' Of course the wit in this case did not influence the result, and it was only a coincidence that a 'false god fell from off his pedestal. . . .'"

"The natural trend of Judge Savage's thought and opinion was essentially progressive, in the proper and legitimate sense of that term. He recognized the fact that in a progressive society neither substantive law nor legal procedure can long remain fixed and stationary; but he believed that the process of reform should not be revolutionary and sweeping, but so gradual that neither the practice of the law nor the interests of business should be unsettled or embarrassed; and that while reformers might be iconoclasts, in the words of Dr. Holmes, 'they should take down the idols so gently that it will seem but an act of worship.'"

QUAINT and CURIOUS

A sheaf of gleanings culled from wayside nooks.

Taken Down. "J. M. M.," writing about "the funniest thing that ever happened to me," in an issue of Puck, tells this very good one:

"I am a lawyer. My wife is a lawyer also, and I might add a very clever one, too. Not a few of my brothers in the profession envy her her practice.

"She takes her luncheon in the building where her office is located, while I lunch at Clark's. For more than a year a crowd of us lawyers have had a circular table at Clark's, and we eat there regularly. All of us are young men except one, and he has had a large, flourishing practice for upward of twenty years. I suspect that he graces our board only because his junior partners have urged him to do so, and I imagine that he is sometimes annoyed at our occasionally immature remarks. At any rate, he rarely opens his mouth except for the purpose of introducing food, and he keeps his eyes on his plate during the whole course of the meal.

"The last time I ate at Clark's, and I intend to make it permanently the last, one of the boys remarked:

" 'Heard your wife plead in that Jones case this morning, Jim. She's a remarkably brilliant woman, your wife.'

"I thought I saw a pretty good chance to pat myself on the back.

" 'Women are imitative,' I answered rather importantly, 'and the constant association with a bright, intellectual man is sure to produce its effect.'

"There was no reply to this, till finally the old lawyer slowly raised his eyes from his plate.

" 'Well,' he asked, innocently solicitous, 'whom do you suspect?' "

A Lawyer's Versatility. It seems that a lawyer is something of a carpenter. He can file a bill, split a hair, chop logic, dovetail an argument, make an entry, get up a case, frame an indictment, impanel a jury, put them in a box, bore a court, chisel a client, and other like things.—Hamilton (Ohio) Journal.

A Wonderful Court. "The greatest court in the world" is the term that has been applied to the Judicial Committee of the Privy Council in Great Britain, a committee with a quorum of only three, which meets in a small stuffy, dingy room in London. Our Supreme Court is the final court of appeal for nearly 100,000,000 people; this court has jurisdiction over 425,000,000 people, and throughout an area of nearly 14,000,000 square miles.

The subjects with which it deals include questions of old Norman custom, from the Channel Islands; of Roman-Dutch law, from South Africa; of the Code Napoléon, from Mauritius; of Ottoman law, from Cyprus; of naval matters, from the admiralty courts; of church affairs from the ecclesiastical courts; and of the religious rights of Hindus and Mohammedans, from India. It is from India that the greatest number of appeals are received.

One such appeal, on a point of conflicting religious rights, had been first decided by a remote village court, and appealed to the Supreme Court of Cal-

cutta. Both decisions had gone against the Mohammedans. They despaired of justice until a shrewd and very holy dervish declared that there yet remained another power to which they could appeal,—a power greater than the King-Emperor himself!

Accordingly, an appeal was taken to this mysterious power, by whom the case was decided in favor of the Mohammedans. Three months later, when the news came, great bonfires were set blazing on the hills in India. The local British Commissioner, somewhat perturbed over a commotion he did not understand, inquired its reason of his native butler, who told him with mingled awe and exultation:

"Sahib, the people are lighting fires in honor of the great sage, who they say rules the Emperor—Judish-al-Komiti!"

Chinese Justice. "One summer afternoon," relates an American who has spent a bit of his time in China, "a young girl passed in the street of Chuanchow, where a shabby scholar set reading to a group of idlers outside the prefect's yamen. She had sold her last doughnut, and the day's earnings lay in her empty basket. Someone noticed how absorbed she was; a deft hand moved lightly, and the money disappeared from the basket.

"When the story came to an end, the girl awoke from her dream to find that the precious pile of cash was gone. She spoke of her loss to the people who stood near, and, with the callousness of a Chinese crowd, they laughed. At that moment the prefect came out of the yamen, noticed the child's grief, and inquired the cause of her trouble. He waited patiently while the girl told her tale between sobs. Meantime a crowd had collected, and the prefect gave orders that the girl be taken to the justice hall, that the case might be tried. When the people saw him re-enter, they trooped in after him, and even the idlers crowded into the yamen to see the fun.

"The examination came to an end without throwing any additional light on the theft, and some of the bystanders began to laugh. His excellency spoke a word to the attendants, and the great doors of the yamen closed with a clatter. 'Such a breach of etiquette must be punished,' said the prefect, speaking slowly and with emphasis. 'Each person shall pay a fine of eight cash before he leaves the court.'

"As the first man laid his cash upon the table, the prefect's eyes scanned his face. Then, to the surprise of everybody, the great man carefully counted the coins with his own fingers. The brown heaps of money increased, and presently a mean-looking fellow came up and paid his fine. His excellency counted the coins. 'This money is covered with grease,' he said. 'What right have you to bring dirty cash to me? Pay eight more for your bad manners.'

"The man put the money on the table without a word.

"'What!' cried the prefect, 'these coins are also covered with grease. It is against the law to pay dirty money into court. Turn out all the money you have. There are sure to be some clean coins among the number.'

"The attendants emptied the fellow's pockets, and found 92 coins.

"'Ah! 92 cash, along with the 16 already paid in fines, make 108—exactly the amount lost by the little girl. How do you account for that?'

"'It is just the sum I had in my pocket.'

"'Where did you get the cash?'

"'I got them from a man in the street in exchange for a large coin. He must have given me greasy money.'

"'Go at once and fetch that man. I will send a runner with you to bring him into court.'

"The man lay in the position that he had to take before the representative of the government, with his head flat upon the pavement, and said nothing.

"'You took this money from the child,' went on the prefect. 'It is covered with grease, because she counted it after handling her oily doughnuts. She lost 108 cash, exactly the sum that was in your pocket when you entered the yamen. You are the thief!'

"A hum of approval spread through the crowded court. Was ever judge so wise as his excellency, who knew both how to attract into his yamen the kind of people among whom the culprit was

likely to be found, and how to single out the thief when once he had him in his power?

"After the money had been counted, the prefect handed it over to the trembling child, who left the court in care of a stout attendant."

Discriminating against Cattle Owners. A paper published "somewhere along the winding Mississippi" has this prognostication as to the probable action of its city council: The regular semi-monthly meeting of the city council will be held to-night in the city hall. The regular order of business matters will be transacted and it is probable a report from the water committee will be heard. One or two ordinances are scheduled for their second reading, and it is thought an ordinance prohibiting *owners* of live stock to roam the streets will be introduced.

A Complimentary Reversal. The supreme court of New Mexico in Hardwick v. Harris, 163 Pac. 253, L.R.A. —, —, reversed the lower court and decided that a judgment debtor under a judgment in one court of the state may be garnished in an action against the judgment creditor in another state court. In its opinion, the supreme court makes the following graceful reference to the lower court: In reversing this case we wish to say that the district court was evidently entirely justified in the action which it took in so far as the point under discussion is concerned. The court followed the well-defined majority doctrine, and has no reason to feel any doubt about its decision. This court, however, has power, and it is its duty, to so mold the law of the state as to bring about a harmonious system calculated, in its opinion, to work out the greatest good to the people. It is for this reason that we adopt the doctrine announced.

Preparedness. Judge James C. Jenkins of New York, formerly a judge in the Philippines, is a firm believer in preparedness, both national and individual. Preparedness, he states, is the best and surest method of avoiding war. This applies to individuals as well as nations. Even the "bully" oftentimes shuns a fight by a *pretended* willingness and readiness to fight. But a bully is never a dangerous man. A barking dog doesn't bite; a bully doesn't fight. Experience is the best teacher. Practical experience is more valuable than theory. *A practical illustration* is more convincing than a dozen theories; and I will give just one.

Thirty years ago I was a practising attorney and represented the plaintiff in a trivial case in a justice of the peace court. It involved only $25. Nevertheless I was anxious to get justice for my client, and I got it; but not without strenuous action.

My opposing counsel was a bully, and didn't want justice; but instead *apparently* wanted a fisticuff fight with me. I didn't want that; because I knew that, while I could win the case, I couldn't win in a "knock down and drag out" combat with him, and benefit nobody, if I did.

He was a trained athlete, 6 feet in height, and weighed 200 pounds. He often boasted that he could whip any man in the state, with one exception. I weighed only 131 pounds and had led a sedentary life, never taking part in athletics, and hardly ordinary physical exercise.

The case was called for trial, and I asked a continuance because the bully had neglected to cross and return interrogatories which I had served upon him, the answers to which were *indispensable* to my case. He *pretended* to have become offended and wanted to fight simply because I made this fact known to the court as a ground for a continuance. He made at me in a belligerent attitude; but the other lawyers present prevented a personal encounter, which was likely to have had but one result,—my being "knocked out," because physically unable to cope with him.

The case, however, was promptly continued; and I not only prepared for trial, but for a *fight,* if there were no way to avoid it; not, however, with fists, but *deadly weapons.* On the way from the courthouse to my office I invested in a "Smith and Wesson." Upon arriving at my office I called in a mutual friend, with the request that he go to the office of my

lawyer antagonist and tell him that I had bought the pistol solely to be used on him, if the necessity arose; that I sincerely hoped such necessity would never arise; but that I refused to fight in any other way; that I had no malice towards him; that I would never harm him, if he did not harm me; that I had armed in self-defense and would defend if need be; that I thought I could shoot, as well as he; that I knew he was more than a match for me physically; that if he intended to "tackle" me, he had better be prepared to kill, if he wanted to be on an equal footing with me, for I intended to kill him, if he gave cause by first attacking me; and that I intended to try the case at the next term of court, if the interrogatories were duly returned.

They were returned and the case was tried; both attorneys were present, and I won. I did not use the Smith and Wesson, though I had it in my pocket; and both he and the justice of the peace knew I had it. I didn't know whether he had one or not.

From that time on for years he was one of the best friends I had out of 400 members of the local bar. The $14 invested in the pistol did the work without a shot being fired at the lawyer; but there were not a few fired at trees in the suburbs of the city during the month preceding the trial.

I had at least one advantage of him by this method of warfare. I was prepared. I was a little older than he. I knew how to handle a gun, and don't think he did. During the Civil War, when less than twelve years old, I had shot many a squirrel out of the tallest trees of the forests with a rifle, while the men were all at the front "whipping the Yankees with corn stalks."

Every One Satisfied. A very angry client entered a New York lawyer's office. He had called upon a debtor, and asked him politely to pay a bill of $2.50, and had been abused for his pains. Now he wanted the lawyer to collect it.

The lawyer demurred. This bill was so small that it would cost the whole amount to collect it.

"No matter," said the angry one. "I don't care if I don't get a cent as long as that fellow has to pay it."

So the lawyer wrote the debtor a letter, and in a day or two the latter appeared in high dudgeon. He did not owe any $2.50, and he would not pay.

"Very well," said the lawyer; "then my instructions are to sue. But I should hardly think it would pay you to stand a suit for so small a sum."

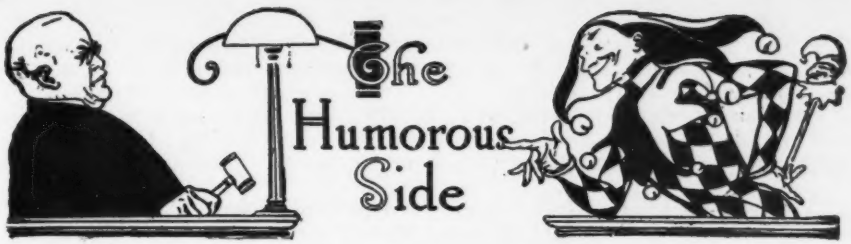
"Who will get the money if I pay it," asked the man.

The lawyer was obliged to confess that he should.

"Very well," said the debtor; "that's another matter. If Smith isn't going to get it I am perfectly willing to pay it."—Youth's Companion.

The Court Paid. In his earlier years, Lord Morris (afterward Lord Chief Justice of Ireland) was Recorder of Galway. On one occasion the last case on the list—a dispute over a few shillings—was argued before him at great length and with much warmth. Lord Morris was anxious to get back to Dublin, where the courts were in full swing and he held important briefs. Within a few minutes the Dublin train was timed to start. The Recorder looked at his watch, but the wrangle did not seem to be approaching an end.

At last he said to the opposing solicitors: "See here, gentlemen, I must catch a train. Here is the sum in dispute;" and throwing down the silver, he vanished from the court.—Green Bag.



"E'en grim-visaged Law can smooth his wrinkled front and smile."

The Cow Won. An official of the board of health in a town not far from Boston notified a citizen that his license to keep a cow on his premises had expired. In reply to this letter, the official received the followed communication:

"Monsieur Bord of Helt—I jus get your notis that my licens to keep my cow has expire. I wish to inform you, M'sieur Bord of Helt, that my cow she beat you to it—she expire t'ree week ago. Much oblige. Yours with respeck.

Pete ————."

—Boston Transcript.

He Was Going Some. A group of visitors was going through the county jail and a burly negro trusty was called to open doors for the visitors.

"How do you like it in here?" one of the women asked.

"Like it, Ma'am? If evuh Ah get out o' heah Ah'll got so fer frum here it'll take $9 to sen' me a postal card."

Too Busy. An Italian, having applied for citizenship, was being examined in naturalization court.

"Who is the President of the United States?"

"Mr. Wils."

"Who is Vice president?"

"Mr. Marsh."

"If the President should die, who then would be President?"

"Mr. Marsh."

"Could you be President?"

"No."

"Why?"

"Mister, you 'scuse, please, I vera busy worka da mine."—Everybody's Magazine.

Continuance in Both Cases. In a New England town a Dr. Jones lives next door to a Judge Smith. The doctor had occasion to sue a man, and naturally employed his neighbor, the judge, as his counsel. After a session of court he met the judge and asked about his case. The judge said it was continued. Meeting him again, after another session, and asking him again about the case, the same answer was given.

Now, since it cost $2 or $3 each time the case was continued, the doctor thought by the time it was settled, after paying the judge, he would get nothing.

Sometime afterward the judge was afflicted with a bone felon, and, of course, employed his neighbor, the doctor. After suffering a while, he met the doctor and said:

"Doctor, this thing is getting along very slowly. I have walked the floor nights for a week. What are you doing to it?"

The doctor, who stammered a bit, replied:

"Co- Co- continuing it, by George!"

A Rare Accomplishment. "I say exactly what I think," exclaimed the positive man.

"I congratulate you," replied Senator Sorghum. "I never yet succeeded in wording a statute in a way that would prevent some lawyer from making it say things I never thought of."—Washington Star.

A Distinguished Sweep. Speaking about college degrees, a chimney sweep who was complainant in a case in Edinburgh gave his name as Jamie Gregory, LL. D.

"Where on earth did you get that distinction?" asked the attorney.

"It was a fellow frae an American university," answered Jamie. "I sweepit his chimney three times. 'I canna pay ye cash, Jamie Gregory,' he says, 'but I'll mak' ye LL. D. an' we'll ca' it quits.' An' he did, sir."—Boston Transcript.

Classifying the Idiots. In a Georgia court the judge observed to the defendant:

"You seem to have committed a grave assault on plaintiff just because he differed from you in an argument."

"There was no help for it, your Honor," said the offender. "The man is a perfect idiot."

"Well, you must pay a fine of $10 and the costs, and in future you should try to understand that idiots are human beings, the same as you and I."

A Unique Suggestion. A constable in a Vermont town recently rounded up a number of hobos. "Come along," he said to them, "you have all got to have a bath."

This announcement was, of course, received with considerable perturbation, especially by the eldest of the men. "What!" he exclaimed, "A bath! A bath with water?"

"Sure thing," said the constable.

"Look here, Mr. Constable," said the apprehensive one. "Couldn't you manage it with one of them vacuum cleaners?"

An Unfamiliar Abridgment. Young William was evincing much interest in the evening paper, but finally a puzzled look came over his countenance.

"Mother," said he, finally, "what does D——d stand for?"

"Doctor of Divinity, my son. Don't they teach you the common abbreviations in school?"

"Sure; but that don't seem to sound right here."

"Read it aloud."

" 'Witness: I heard the defendant say, "I'll make you suffer for this. I'll be doctor of divinity if I don't"!' "—Harper's Magazine.

A Good Defense. Magistrate—"You are accused of attempting to kiss the prosecutrix in the street last night. Do you plead guilty or not guilty?"

Prisoner (after careful survey of the lady)—"Your Worship, I plead temporary insanity!"—Passing Show.

Apt Comparison. An aged colored woman was much excited following the shooting of a colored boy at Darnell and West streets by a negro who shot at another man and hit the boy. The police were trying to find the negro who did the shooting.

"A policeman is just like a rainbow," asserted the old woman. "They always show up after the storm's over."—Indianapolis News.

Horse Might Be in the Way. A colored patriot who presented himself for registration out in Missouri was asked what branch of the service he preferred. He seemed puzzled by the courtesy, but presently asked:

"What branches have you?"

"There are the cavalry and the infantry," one of the clerks explained.

"What's the difference?" asked the negro.

"In the cavalry you ride a horse, and in the infantry you walk."

"I'll take the infantry," said the black man.

Curious to know what prompted his decision, one of his inquisitors asked him.

"It's lak dis," the negro exclaimed. "If ah haves to retreat ah don't want to be bothered by no hawse."—St. Louis Post Dispatch.

Conscription's Advantage. "The advantage of conscription," said ex-President Taft, "is that it puts every man in the best place fitted for him.

"It's like the case of the captain of the man-of-war. He saw a new hand loafing by the rail.

" 'What was this chap in civil life?' he demanded.

" 'A milkman, sir,' was the reply.

" 'Then,' roared the captain 'to the pumps with him at once!' "—Philadelphia Bulletin.